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WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, November 13, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

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POSTAL SERVICE

39 CFR Part 111

Retirement of FASTforward Technology

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service will revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 602.5.0 to terminate the use of *FASTforward*™ technology as a Move Update option for commercial First-Class Mail®, First-Class Package Service™, Standard Mail®, and Parcel Select Lightweight® mailings.

DATES: *Effective date:* January 27, 2013.

FOR FURTHER INFORMATION CONTACT: Charles Hunt at 901–681–4651, or Bill Chatfield at 202–268–7278.

SUPPLEMENTARY INFORMATION: On September 4, 2012, the Postal Service published a proposed rule in the **Federal Register** (77 FR 53830) to retire *FASTforward* technology. We received no formal comments on the proposal. Therefore, we will proceed as proposed.

FASTforward, a licensed hardware/software change-of-address system, was developed in 1996 to enable Multi-Line Optical Character Reader (MLOCR) users a means to meet the Move Update requirement for their commercial mailings. Using the best technology then available, most of the *FASTforward* ''black boxes'' were 386/486 processors using secured cards and cabling operations. By 2009, many of the original black boxes were failing, and finding replacement parts became difficult. In February 2009, the USPS™ announced its intention to retire the *FASTforward* system by the end of FY2012 and migrate the licensees to the newer more robust NCOALink® MPE (Mail Processing Equipment) licensed software system. In August 2011, the USPS established an ad hoc workgroup consisting of postal personnel, MLOCR manufacturers and mailers and representatives of the National Association of Presort Mailers (NAPM). The workgroup has resolved the issues to ensure a smooth migration from the antiquated *FASTforward* system to the newer NCOALink MPE system.

The termination date for *FASTforward* will be January 27, 2013. Mailers may begin to use the NCOALink MPE system at any time as a method of meeting the Move Update standards.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM):

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM):

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

602 Addressing

* * * * *

5.0 Move Update Standards

* * * * *

5.2 USPS-Approved Methods

The following methods are authorized for meeting the Move Update standard:

* * * * *

[Revise item 5.2b as follows:]

b. National Change of Address Linkage System (NCOALink). This includes both pre-mail NCOALink processing systems and the physical mailpiece processing equipment system: National Change of Address Linkage System Mail Processing Equipment (NCOALink MPE). See the NCOALink page (NCOALink MPE Solutions) on *ribbs.usps.gov*[f] or more information on the MPE application.

[Delete item 5.2c in its entirety and redesignate current items 5.2d and 5.2e as new 5.2c and 5.2d respectively.]

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Stanley F. Mires,

Attorney, Legal Policy and Legislative Advice.

[FR Doc. 2012–26697 Filed 11–1–12; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 721

[EPA–HQ–OPPT–2012–0740; FRL–9366–7]

RIN 2070–AB27

Significant New Use Rules on Certain Chemical Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is promulgating significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for 20 chemical substances which were the subject of premanufacture notices (PMNs). Eight of these chemical substances are subject to TSCA section 5(e) consent orders issued by EPA. This action requires persons who intend to manufacture, import, or process any of these 20 chemical substances for an activity that is designated as a significant new use by this rule to notify EPA at least 90 days before commencing that activity. The required notification will provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

DATES: This rule is effective on January 2, 2013. For purposes of judicial review, this rule shall be promulgated at 1 p.m. (e.s.t.) on November 16, 2012.

Written adverse or critical comments, or notice of intent to submit adverse or

critical comments, on one or more of these SNURs must be received on or before December 3, 2012 (see Unit VI. of the **SUPPLEMENTARY INFORMATION**).

For additional information on related reporting requirement dates, see Units I.A., VI., and VII. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0740, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2012–0740. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2012–0740. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *regulations.gov* or email. The *regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: *moss.kenneth@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substances contained in this rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers, importers, or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127 and 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to these SNURs must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the agency taking?

EPA is promulgating these SNURs using direct final procedures. These SNURs will require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of a chemical substance for any activity designated by these SNURs as a significant new use. Receipt of such notices allows EPA to assess risks that may be presented by the intended uses and, if appropriate, to regulate the proposed use before it occurs. Additional rationale and background to these rules are more fully set out in the preamble to EPA's first direct final SNUR published in the **Federal Register** issue of April 24, 1990 (55 FR 17376) (April 24, 1990 SNUR). Consult that preamble for further information on the objectives, rationale, and procedures for SNURs and on the basis for significant new use designations, including provisions for developing test data.

B. What is the agency's authority for taking this action?

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the four bulleted TSCA section 5(a)(2) factors listed in Unit III. Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Persons who must report are described in § 721.5.

C. Applicability of General Provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. According to § 721.1(c), persons subject to these SNURs must comply with the same SNUN requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorized EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the 20 chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances, likely human exposures and environmental releases associated with possible uses, and the four bulleted TSCA section 5(a)(2) factors listed in this unit.

IV. Substances Subject to This Rule

EPA is establishing significant new use and recordkeeping requirements for 20 chemical substances in 40 CFR part 721, subpart E. In this unit, EPA provides the following information for each chemical substance:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Basis for the TSCA section 5(e) consent order or, for non-section 5(e) SNURs, the basis for the SNUR (i.e., SNURs without TSCA section 5(e) consent orders).
- Toxicity concerns.
- Tests recommended by EPA to provide sufficient information to evaluate the chemical substance (see Unit VIII. for more information).
- CFR citation assigned in the regulatory text section of this rule.

The regulatory text section of this rule specifies the activities designated as significant new uses. Certain new uses, including production volume limits (i.e., limits on manufacture and importation volume) and other uses designated in this rule, may be claimed as CBI. Unit IX. discusses a procedure companies may use to ascertain whether a proposed use constitutes a significant new use.

This rule includes 8 PMN substances that are subject to ''risk-based'' consent orders under TSCA section 5(e)(1)(A)(ii)(I) where EPA determined that activities associated with the PMN substances may present unreasonable risk to human health or the environment. Those consent orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The so-called ''5(e) SNURs'' on these PMN substances are promulgated pursuant to § 721.160, and are based on and consistent with the provisions in the underlying consent orders. The 5(e) SNURs designate as a ''significant new use'' the absence of the protective measures required in the corresponding consent orders.

Where EPA determined that the PMN substance may present an unreasonable risk of injury to human health via inhalation exposure, the underlying TSCA section 5(e) consent order usually requires, among other things, that potentially exposed employees wear specified respirators unless actual measurements of the workplace air show that air-borne concentrations of the PMN substance are below a New Chemical Exposure Limit (NCEL) that is established by EPA to provide adequate protection to human health. In addition to the actual NCEL concentration, the comprehensive NCELs provisions in TSCA section 5(e) consent orders, which are modeled after Occupational Safety and Health Administration (OSHA) Permissible Exposure Limits (PELs) provisions, include requirements

addressing performance criteria for sampling and analytical methods, periodic monitoring, respiratory protection, and recordkeeping. However, no comparable NCEL provisions currently exist in 40 CFR part 721, subpart B, for SNURs. Therefore, for these cases, the individual SNURs in 40 CFR part 721, subpart E, will state that persons subject to the SNUR who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. EPA expects that persons whose § 721.30 requests to use the NCELs approach for SNURs are approved by EPA will be required to comply with NCELs provisions that are comparable to those contained in the corresponding TSCA section 5(e) consent order for the same chemical substance.

This rule also includes SNURs on 12 PMN substances that are not subject to consent orders under TSCA section 5(e). In these cases, for a variety of reasons, EPA did not find that the use scenario described in the PMN triggered the determinations set forth under TSCA section 5(e). However, EPA does believe that certain changes from the use scenario described in the PMN could result in increased exposures, thereby constituting a ''significant new use.'' These so-called ''non-section 5(e) SNURs'' are promulgated pursuant to § 721.170. EPA has determined that every activity designated as a ''significant new use'' in all non-section 5(e) SNURs issued under § 721.170 satisfies the two requirements stipulated in § 721.170(c)(2), i.e., these significant new use activities, ''(i) are different from those described in the premanufacture notice for the substance, including any amendments, deletions, and additions of activities to the premanufacture notice, and (ii) may be accompanied by changes in exposure or release levels that are significant in relation to the health or environmental concerns identified'' for the PMN substance.

PMN Number P–11–135

Chemical name: Benzoic acid, 4-[(1-oxodecyl)oxy]-.

CAS number: 86960–46–5.

Basis for action: The PMN states that the generic (non-confidential) use of the substance is as a cleaning enhancer additive for laundry and automatic dish-washing products. Based on test data on the PMN substance, and ecological structural activity relationship (EcoSAR) analysis of test data on analogous esters, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 18 ppb of the PMN substance in surface waters for greater than 20 days per year. This 20-day criterion is derived from partial life cycle tests (daphnid chronic and fish early-life stage tests) that typically range from 21 to 28 days in duration. EPA predicts toxicity to aquatic organisms may occur if releases of the PMN substance to surface water exceed releases from the use described in the PMN. For the use described in the PMN, environmental releases did not exceed 18 ppb for more than 20 days per year. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that any domestic manufacture or use of the substance other than as described in the PMN could result in exposures which may cause significant adverse environmental effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(4)(i) and (b)(4)(ii).

Recommended testing: EPA has determined that the results of a fish early-life stage toxicity test (Office of Pollution Prevention and Toxic Substances (OPPTS) Test Guideline 850.1400) and a daphnid chronic toxicity test (OPPTS Test Guideline 850.1300) would help characterize the environmental effects of the PMN substance. Due to low water solubility, EPA also recommends that the special considerations for conducting aquatic laboratory studies (OPPTS Test Guideline 850.1000) be followed to facilitate solubility in the test media.

CFR citation: 40 CFR 721.10611.

PMN Numbers P–11–327, P–11–328, P–11–329, P–11–330, P–11–331, and P–11–332

Chemical names: Distillates (lignocellulosic), C5–40 (P11–327); Paraffin waxes (lignocellulosic) hydrotreated, C5–40-branched, cyclic and linear (P–11–328); Naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (P–11–329); Kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (P–11–330); Distillates (lignocellulosic), hydrotreated, C8–26-branched, cyclic, and linear (P–11–331); and Residual oils (lignocellulosic), hydrotreated, C20–40-branched, cyclic, and linear (P–11–332).

CAS numbers: 1267611–99–3 (P–11–327), 1267611–06–2 (P–11–328), 1267611–35–7 (P–11–329), 1267611–14–2 (P–11–330), 1267611–11–9 (P–11–331), and 1267611–71–1 (P–11–332).

Effective date of TSCA section 5(e) consent order: July 21, 2012.

Basis for TSCA section 5(e) consent order: The PMN states that the generic (non-confidential) uses of the PMN substances will be as a distillation feedstock after hydrotreatment (P–11–327), as a feedstock (P–11–328), as a blend-stock for conventional fossil fuels (P–11–329, P–11–330, and P–11–331) and use in a manner comparable to gas oil as it is currently used in industry (P–11–332). These PMNs are complex mixtures and have been assessed based on the toxic components within their mixture. The most important and primary component present is benzene. Based on this analysis, EPA identified concerns for oncogenicity, immunosuppression, and skin sensitization (defatting of the skin tissue) to workers exposed to the PMN substances. The EPA Maximum Contaminant Level for benzene in drinking water is 5 ppb. The PMNs' new chemical exposure limit (NCEL) is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. In addition, based on EcoSAR analysis of test data on analogous neutral organics, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 82 ppb for P–11–329 and P–11–331, and 180 ppb for P–11–327, P–11–328, P–11–330, and P–11–332. However, EPA does not expect risk to aquatic organisms at the expected levels and duration of exposure as described in the PMNs. The consent order was issued under TSCA sections 5(e)(1)(A)(i) and 5(e)(1)(A)(ii)(I) based on a finding that these substances may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the consent order requires:

1. Use of personal protective equipment including dermal protection when there is potential dermal exposure and a National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an assigned protection factor (APF) of at least 10,000, or compliance with a NCEL of 0.32 mg/m^3 as an 8-hour time-weighted average when there is potential inhalation exposure.

2. No use of the substances resulting in surface water concentrations exceeding 5 ppb of the combination of these PMN substances.

3. Establishment and use of a hazard communication program.

The SNUR designates as a ''significant new use'' the absence of these protective measures.

Recommended testing: EPA has determined that a combined chronic toxicity/carcinogenicity test (OPPTS Test Guideline 870.4300); a daphnid chronic toxicity test (OPPTS Test Guideline 850.1300); and fish early-life stage toxicity test (OPPTS Test

Guideline 850.1400) would help characterize the human health and environmental effects of the PMN substances. The Order does not require submission of the testing at any specified time or production volume. However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

CFR citations: 40 CFR 721.10612 (P–11–237); 721.10613 (P–11–328); 721.10614 (P–11–329); 721.10615 (P–11–330); 721.10616 (P–11–331); and 721.10617 (P–11–332).

PMN Number P–11–607

Chemical name: Polyaromatic Organophosphorus Compound (generic).

CAS number: Not available.

Effective date of TSCA section 5(e) consent order: July 11, 2012.

Basis for TSCA section 5(e) consent order: The PMN states that the generic (non-confidential) use of the substance will be as an additive flame retardant (open, non-dispersive use). Based on test data on the PMN substance itself, EPA expects the PMN substance to hydrolyze under neutral and basic conditions. EPA does not expect significant human health concerns from the intact chemical, but there is uncertainty regarding the hydrolysis products. Based on test data on structurally similar phosphinate esters and submitted algae data on the PMN substance itself, EPA expects toxicity to aquatic organisms to occur at concentrations that exceed 6 ppb. The consent order was issued under TSCA sections 5(e)(1)(A)(i), 5(e)(1)(A)(ii)(I), and 5(e)(1)(A)(ii)(II) based on findings that uncontrolled manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance may present an unreasonable risk of injury to the environment, the substance may be produced in substantial quantities, may reasonably be anticipated to enter the environment in substantial quantities, and there may be significant (or substantial) human exposure to the substance and its potential degradation products. To protect against these risks the consent order requires:

1. Use of the substance only as described in the PMN.

2. Establishment and use of a hazard communication program.

3. No use of the substance that results in releases to surface water.

Recommended testing: EPA has determined that certain testing would help characterize the fate, environmental and human health effects of the PMN substance. The consent order contains two production limits. The PMN submitter has agreed not to exceed the first production volume limit without performing: A daphnid chronic toxicity test (OPPTS Test Guideline 850.1300); fish early-life stage toxicity test (OPPTS Test Guideline 850.1400); a washing machine study at basic pH based on the International Organization for Standardization (ISO) color fastness test to ascertain release rates with analytics to identify hydrolysis products (ISO 105); an inherent biodegradability test (OPPTS Test Guideline 835.3215); and a hydrolysis as a function of pH and temperature test (OPPTS Test Guideline 835.2130). If the results of the first tier of testing demonstrate that the PMN substance may cause adverse effects to humans or the environment, the PMN submitter has agreed to not exceed a production limit before conducting additional testing to ascertain whether those releases from representative end-use articles are in sufficient quantities to pose a significant risk.

EPA has also determined that a prenatal developmental toxicity study (OPPTS Test Guideline 870.3700 or OECD 414) using oral (gavage) in the rat would help characterize the human health effects of the PMN substance. The order does not require the submission of the prenatal developmental toxicity study at any specified time or production volume. However, the order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

CFR citation: 40 CFR 721.10618.

PMN Number P–11–653

Chemical name: Perfluoroalkylethyl methacrylate copolymer (generic).

CAS number: Not available.

Effective date of TSCA section 5(e) consent order: July 12, 2012.

Basis for TSCA section 5(e) consent order: The PMN states that the generic (non-confidential) use of the substance will be as a water and oil repellant. EPA has concerns for the formation of potential incineration or other decomposition products from the PMN substance. These perfluorinated products may be released to the environment from incomplete incineration of the PMN substance at low temperatures. EPA has preliminary evidence, including data on some fluorinated polymers, suggesting that, under some conditions, the PMN substance could degrade in the environment. EPA has concerns that these degradation products will persist in the environment, could bioaccumulate or biomagnify, and could be toxic to people, wild mammals, and birds. These concerns are based on data on analog chemicals, including perfluorooctanoic acid (PFOA) and other perfluorinated carboxylates, such as the presumed environmental degradant of the PMN substance, perfluorohexanoic acid (PFHxA). There is pharmacokinetic and toxicological data in animals on PFOA, as well as epidemiological and blood monitoring data in humans. Toxicity studies on PFOA indicate developmental, reproductive, and systemic toxicity in various species, as well as cancer. These factors, taken together, raise concerns for potential adverse chronic effects from the presumed degradation product in humans and wildlife. The consent order was issued under TSCA sections 5(e)(1)(A)(i), 5(e)(1)(A)(ii)(I), and 5(e)(1)(A)(ii)(II), based on a finding that this substance may present an unreasonable risk of injury to human health and the environment, the substance may be produced in substantial quantities and may reasonably be anticipated to enter the environment in substantial quantities, and there may be significant (or substantial) human exposure to the substance and its potential degradation products. To protect against these risks, the consent order requires risk notification. If the Company becomes aware that the PMN substance may present a risk of injury to human health or the environment, the Company must incorporate this new information, and any information on methods for protecting against such risk into a MSDS, within 90 days. The SNUR designates as a ''significant new use'' the absence of this protective measure.

Recommended testing: EPA has determined that the results of certain fate testing identified in the consent order would help characterize possible effects of the substance and its degradation products. The PMN submitter has agreed not to manufacture or import the PMN substance after September 30, 2014, without performing a modified semi-continuous activated sludge (SCAS) test (OPPTS Test Guideline 835.5045 or OECD Test Guideline 302A); a UV/visible absorption test (OPPTS Test Guideline 830.7050); direct photolysis rate in water by sunlight test (OPPTS Test Guideline 835.2210); a hydrolysis as a function of pH and temperature test

(OPPTS Test Guideline 835.2130 or OECD Test Guideline 111); an indirect photolysis screening test: sunlight photolysis in waters containing dissolved humic substances (OPPTS Test Guideline 835.5270); a photolysis on soils study using the phototransformation of chemicals on soil surfaces OECD Test Guideline 2005 Draft (located in the docket under docket ID number EPA–HQ–OPPT–2012–0740); aerobic and anaerobic transformation in aquatic sediment systems (OECD Test Guideline 308); and an anaerobic biodegradability of organic compounds in digested sludge by measurement of gas production test (OECD Test Guideline 311). These tests are further detailed in the consent order. EPA has determined if the substance was to be sprayed by commercial or consumer applicants, that the results of a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) in rats with a 60-day holding period would help characterize possible effects of the substance and its degradation products. The consent order does not require submission of the inhalation testing at any specified time or production volume. However, the consent order's restrictions on manufacture, import, processing, distribution in commerce, use, and disposal of the PMN will remain in effect until the consent order is modified or revoked by EPA based on submission of that or other relevant information.

CFR citation: 40 CFR 721.10619.

PMN Number P–12–191

Chemical name: Oxirane, 2,2′-(phenylene)bis-.

CAS number: 30424–08–9.

Basis for action: The PMN states that the generic (non-confidential) use of the substance is as a component of adhesives and composites. Based on structural activity relationship (SAR) of test data on analogous epoxides, EPA identified developmental and male reproductive toxicity and cancer concerns to workers exposed to the PMN substance via the inhalation route. In addition, based on EcoSAR analysis of test data on analogous epoxides, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 10 ppb of the PMN substance in surface waters. As described in the PMN, significant inhalation exposures are not expected due to low vapor pressure when the substance is distributed with less than or equal to 5 percent impurities, and releases of the substance are not expected to result in surface water concentrations that exceed 10 ppb. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that any distribution of the substance with greater than 5 percent impurities, or any use of the substance resulting in surface water concentrations exceeding 10 ppb may cause serious health effects and significant adverse environmental effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(1)(i)(C), (b)(3)(ii), and (b)(4)(ii).

Recommended testing: EPA has determined that the results of a ready biodegradability test (OPPTS Test Guideline 835.3110); a combined repeated-dose toxicity study with the reproduction/developmental toxicity screening test (OECD Test Guideline 422) via the inhalation route in rats; a carcinogenicity study (OECD Test Guideline 451); a fish early-life stage toxicity test (OPPTS Test Guideline 850.1400); and a daphnid chronic toxicity test (OPPTS Test Guideline 850.1300) would help characterize the human health and environmental effects of the PMN substance.

CFR citation: 40 CFR 721.10620.

PMN Number P–12–196

Chemical name: Distillation bottoms, alkylated benzene by-product (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic (non confidential) use of the substance is for bromine recovery. Based on test data on the PMN substance and EcoSAR analysis of test data on analogous neutral organics, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 1 ppb of the PMN substance in surface waters.

As described in the PMN, releases of the substance are not expected to result in surface water concentrations that exceed 1 ppb. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that any use of the substance resulting in surface water concentrations exceeding 1 ppb may cause significant adverse environmental effects. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that the results of a fish early-life stage toxicity test (OPPTS Test Guideline 850.1400); a daphnid chronic toxicity test (OPPTS Test Guideline 850.1300); and an algal toxicity test (Office of Chemical Safety and Pollution Prevention (OCSPP) Test Guidelines 850.4500) would help characterize the environmental effects of the PMN substance. EPA also recommends that the special considerations for conducting aquatic laboratory studies (OPPTS Test Guideline 850.1000) be followed to facilitate solubility in the test media, because of the PMN's low water solubility.

CFR citation: 40 CFR 721.10621.

PMN Number P–12–285

Chemical name: Copper(2+), tetraammine-, chloride (1:2).

CAS number: 10534–87–9.

Basis for action: The PMN states that the generic (non confidential) uses of the substance are as a raw material for production of copper chemicals and as a raw material for the production of animal feed micronutrients. Based on test data on the PMN substance and EcoSAR analysis of test data on analogous inorganic copper complexes, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 3 ppb of the PMN substance in surface waters. As described in the PMN, releases of the substance are not expected to result in surface water concentrations that exceed 3 ppb. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that any use of the substance resulting in surface water concentrations exceeding 3 ppb may cause significant adverse environmental effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(4)(i) and (b)(4)(ii).

Recommended testing: EPA has determined that the results of a fish BCF Test (OPPTS Test Guideline 850.1730) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.10622.

PMN Numbers P–12–298 and P–12–299

Chemical name: Vinylidene ester (generic).

CAS number: Not available.

Basis for action: The PMN states that the substance will be used as an adhesive. Based on EcoSAR analysis of test data on analogous esters, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 7 ppb of the PMN substance in surface waters for greater than 20 days per year. This 20-day criterion is derived from partial life cycle tests (daphnid chronic and fish early-life stage tests) that typically range from 21 to 28 days in duration. EPA predicts toxicity to aquatic organisms may occur if releases of the PMN substance to surface water

exceed releases from the use described in the PMN. For the use described in the PMN, environmental releases did not exceed 7 ppb for more than 20 days per year. if releases of the PMN substances to surface water from uses other than described in the PMN exceed the releases expected from the use described in the PMN. For the described use in the PMN, significant environmental releases are not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that combined production volume of the two PMN substances exceeding 20,000 kilograms per year could result in exposures which may cause significant adverse environmental effects. Based on this information, the PMN substances meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that the results of a fish acute toxicity test, freshwater and marine (OPPTS Test Guidelines 850.1075); an aquatic invertebrate acute toxicity test, freshwater daphnids (OPPTS Test Guidelines 850.1010); and an algal toxicity test (OCSPP Test Guideline 850.4500) would help characterize the environmental effects of the PMN substances.

CFR citation: 40 CFR 721.10623.

PMN Number P–12–326

Chemical name: Dicyclohexylmethane-4,4′-diisocyanate, polymer with ethoxylated, propoxylated polyethers (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the substance will be as part of 2-component reactive polyurethane adhesive resin. Based on analogous diisocyanate substances, EPA identified concerns for potential dermal and respiratory sensitization from dermal and inhalation exposures, and for pulmonary toxicity from inhalation exposure to the PMN substance. Specifically, the Agency expects potential toxicity to workers from dermal or inhalation exposure to the PMN substance when the molecular weight is less than 1000 daltons. For the uses described in the PMN and due to the use of personal protective equipment, significant worker exposure to the PMN substance where the molecular weight is less than 1000 daltons is unlikely, as dermal and inhalation exposure is not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that the manufacture, processing, or use of the substance where the molecular weight is less than 1000 daltons may cause serious health effects. Based on this information, the PMN substance meets the concern criteria at § 721.170(b)(3)(ii).

Recommended testing: EPA has determined that the results of a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) and a skin sensitization test (OPPTS Test Guideline 870.2600) would help characterize the human health effects of the PMN substance.

CFR citation: 40 CFR 721.10624.

PMN Numbers P–12–332 and P–12–333

Chemical name: Distillation bottoms, alkylated benzene by-product, brominated and bromo diphenyl alkane.

CAS number: Not available.

Basis for action: The PMNs state that the PMN substances will be used as a feed for a bromine recovery unit. Based on test data on analogous chemical substances, the Agency identified concerns for liver toxicity and the potential for other human health risks due to the possible formation of dioxins and furans. These concerns are for workers exposed to the PMN substances by the inhalation and dermal routes. For the uses described in the PMNs and due to the use of personal protective equipment, significant worker exposure is unlikely, as dermal and inhalation exposure is not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substances may present an unreasonable risk. EPA has determined, however, that use of the substances other than as described in the PMNs may cause serious health effects. Based on this information, the PMN substances meet the concern criteria at § 721.170(b)(3)(ii).

Recommended testing: EPA has determined that the results of a 90-day oral toxicity in rodents test (OPPTS Test Guideline 870.3100) and either a determination of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans from stationary sources study (EPA Method 23); or a polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs) by high resolution gas chromatography/high resolution mass spectrometry (HRGC/HRMS) study (EPA Method 8290A); or a same-sample determination of ultratrace levels of polybromodiphenylethers, polybromodibenzo-p-dioxins/furans, and polychlorodibenzo-p-dioxins/furans from combustion flue gas study (Wyrzykowska, B., Tabor, D., and Gullett, B. Anal. Chem., 2009, 81 (11), 4334–4342.) on each of the PMN substances would help characterize the human health effects of the PMN substances.

CFR citation: 40 CFR 721.10625.

PMN Number P–12–373

Chemical name: 1,4-Butanediol, polymer with substituted alkane and substituted methylene biscarbomonocycle, 2-hydroxyalkyl acrylate-blocked (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the substance will be as an abrasion resistant, formable dual-cure lacquer for screen printing. Based on test data on analogous acrylates and isocyanates, EPA identified concerns for respiratory and dermal sensitization and irritation to workers from exposure to the PMN substance. Additionally, the Agency identified low to moderate concern for mutagenicity, oncogenicity, and developmental toxicity for the low molecular weight acrylates. For the uses described in the PMNs significant worker exposure is unlikely because there are no applications generating a vapor, mist or aerosol, and there are no consumer exposures. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of these substances may present an unreasonable risk. EPA has determined, however, that any use of the substance in consumer products; or any use of the substance involving an application method that generates a vapor, mist, or aerosol may cause serious health effects. For the uses described in the PMN and due to the use of personal protective equipment, significant worker exposure is unlikely, as dermal and inhalation exposure is not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that use of the substance in consumer products or in spray applications may cause serious health effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(3)(ii).

Recommended testing: EPA has determined that a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) and a skin sensitization test (OPPTS Test Guideline 870.2600) would help characterize the human health effects of the PMN substance.

CFR citation: 40 CFR 721.10626.

PMN Number P–12–430

Chemical name: Yttrium borate phosphate vanadate with europium and additional dopants (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a coating for the interior surface of glass lamps. Based on test data on analogous chemical substances, EPA identified health concerns for lung effects if the poorly soluble, respirable particles are inhaled. Additionally, due to the crystalline structure of the PMN substance, the Agency identified concern for oncogenicity if the PMN substance was inhaled. These concerns are for workers exposed to the PMN substance by inhalation. For the use described in the PMN and at the production volume stated in the PMN, significant worker inhalation exposure is not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that use of the PMN substance other than as described in the PMN or use exceeding the annual manufacture or import volume stated in the PMN may result in serious health effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(1)(i)(c) and (b)(3)(ii).

Recommended testing: EPA has determined that a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) would help characterize the health effects of the PMN substance.

CFR citation: 40 CFR 721.10627.

PMN Number P–12–432

Chemical name: Mixed metal oxalate (generic).

CAS number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as an intermediate precipitate used to produce phosphors. Based on test data on analogous chemical substances, EPA identified health concerns for lung effects if the poorly soluble, respirable particles are inhaled. Additionally, due to the crystalline structure of the PMN substance, the Agency identified concern for oncogenicity if the PMN substance was inhaled. These concerns are for workers exposed to the PMN substance by inhalation. For the use described in the PMN and at the production volume stated in the PMN, significant worker inhalation exposure is not expected. Therefore, EPA has not determined that the proposed manufacturing, processing, or use of the substance may present an unreasonable risk. EPA has determined, however, that use of the PMN substance other than as described in the PMN or use exceeding the annual manufacture or import volume stated in the PMN may result in serious health effects. Based on this information, the PMN substance meets the concern criteria at § 721.170 (b)(1)(i)(c) and (b)(3)(ii).

Recommended testing: EPA has determined that a 90-day inhalation toxicity test (OPPTS Test Guideline 870.3465) would help characterize the health effects of the PMN substance.

CFR citation: 40 CFR 721.10628.

V. Rationale and Objectives of the Rule

A. Rationale

During review of the PMNs submitted for the chemical substances that are subject to these SNURs, EPA concluded that for 8 of the 20 chemical substances, regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of the chemical substances. The basis for such findings is outlined in Unit IV. Based on these findings, TSCA section 5(e) consent orders requiring the use of appropriate exposure controls were negotiated with the PMN submitters. The SNUR provisions for these chemical substances are consistent with the provisions of the TSCA section 5(e) consent orders. These SNURs are promulgated pursuant to § 721.160 (see Unit II.).

In the other 12 cases, where the uses are not regulated under a TSCA section 5(e) consent order, EPA determined that one or more of the criteria of concern established at § 721.170 were met, as discussed in Unit IV.

B. Objectives

EPA is issuing these SNURs for specific chemical substances which have undergone premanufacture review because the Agency wants to achieve the following objectives with regard to the significant new uses designated in this rule:

- EPA will receive notice of any person's intent to manufacture, import, or process a listed chemical substance for the described significant new use before that activity begins.
- EPA will have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing, importing, or processing a listed chemical substance for the described significant new use.
- EPA will be able to regulate prospective manufacturers, importers, or processors of a listed chemical substance before the described significant new use of that chemical substance occurs, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6, or 7.
- EPA will ensure that all manufacturers, importers, and processors of the same chemical substance that is subject to a TSCA section 5(e) consent order are subject to similar requirements.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Chemical Substance Inventory (TSCA Inventory). Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the Internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

VI. Direct Final Procedures

EPA is issuing these SNURs as a direct final rule, as described in § 721.160(c)(3) and § 721.170(d)(4). In accordance with § 721.160(c)(3)(ii) and § 721.170(d)(4)(i)(B), the effective date of this rule is January 2, 2013 without further notice, unless EPA receives written adverse or critical comments, or notice of intent to submit adverse or critical comments before December 3, 2012.

If EPA receives written adverse or critical comments, or notice of intent to submit adverse or critical comments, on one or more of these SNURs before December 3, 2012, EPA will withdraw the relevant sections of this direct final rule before its effective date. EPA will then issue a proposed SNUR for the chemical substance(s) on which adverse or critical comments were received, providing a 30-day period for public comment.

This rule establishes SNURs for a number of chemical substances. Any person who submits adverse or critical comments, or notice of intent to submit adverse or critical comments, must identify the chemical substance and the new use to which it applies. EPA will not withdraw a SNUR for a chemical substance not identified in the comment.

VII. Applicability of Rule to Uses Occurring Before Effective Date of the Rule

Significant new use designations for a chemical substance are legally established as of the date of publication of this direct final rule, November 2, 2012.

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. The chemical substances

subject to this rule have undergone premanufacture review. TSCA section 5(e) consent orders have been issued for 8 chemical substances and the PMN submitters are prohibited by the TSCA section 5(e) consent orders from undertaking activities which EPA is designating as significant new uses. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no other person may commence such activities without first submitting a PMN. For chemical substances for which an NOC has not been submitted at this time, EPA concludes that the uses are not ongoing. However, EPA recognizes that prior to the effective date of the rule, when chemical substances identified in this SNUR are added to the TSCA Inventory, other persons may engage in a significant new use as defined in this rule before the effective date of the rule. However, 11 of the 20 chemical substances contained in this rule have CBI chemical identities, and since EPA has received a limited number of post-PMN *bona fide* submissions (per §§ 720.25 and 721.11), the Agency believes that it is highly unlikely that any of the significant new uses described in the regulatory text of this rule are ongoing.

As discussed in the April 24, 1990 SNUR, EPA has decided that the intent of TSCA section 5(a)(1)(B) is best served by designating a use as a significant new use as of the date of publication of this direct final rule rather than as of the effective date of the rule. If uses begun after publication were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notification requirements because a person could defeat the SNUR by initiating the significant new use before the rule became effective, and then argue that the use was ongoing before the effective date of the rule. Thus, persons who begin commercial manufacture, import, or processing of the chemical substances regulated through this SNUR will have to cease any such activity before the effective date of this rule. To resume their activities, these persons would have to comply with all applicable SNUR notification requirements and wait until the notice review period, including any extensions, expires.

EPA has promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person meets the conditions of advance compliance under § 721.45(h), the person is considered exempt from the requirements of the SNUR.

VIII. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. The two exceptions are:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).

2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. In cases where EPA issued a TSCA section 5(e) consent order that requires or recommends certain testing, Unit IV. lists those tests. Unit IV. also lists recommended testing for non-5(e) SNURs. Descriptions of tests are provided for informational purposes. EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. To access the OCSPP and OPPTS test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines'' or for guidelines not currently available on the Web site, EPA has placed a copy of that guideline in the public docket. The Organization for Economic Co-operation and Development (OECD) test guidelines are available from the OECD Bookshop at *http://www.oecdbookshop.org* or SourceOECD at *http://www.sourceoecd.org.* To access EPA Method 23 and Method 8290A, please go to *http://www.epa.gov/ttn/emc/methods/method23.html* and *http://www.epa.gov/osw/hazard/testmethods/sw846/pdfs/8290a.pdf*. To access the International Organization for Standardization (ISO) standard, ISO 105, please go to *http://www.ihs.com/products/industry-standards/org/iso/list/page9.aspx*.

In the TSCA section 5(e) consent orders for several of the chemical substances regulated under this rule, EPA has established production volume limits in view of the lack of data on the potential health and environmental risks that may be posed by the significant new uses or increased exposure to the chemical substances. These limits cannot be exceeded unless the PMN submitter first submits the results of toxicity tests that would permit a reasoned evaluation of the potential risks posed by these chemical substances. Under recent TSCA section 5(e) consent orders, each PMN submitter is required to submit each study at least 14 weeks (earlier TSCA section 5(e) consent orders required submissions at least 12 weeks) before reaching the specified production limit. Listings of the tests specified in the TSCA section 5(e) consent orders are included in Unit IV. The SNURs contain the same production volume limits as the TSCA section 5(e) consent orders. Exceeding these production limits is defined as a significant new use. Persons who intend to exceed the production limit must notify the Agency by submitting a SNUN at least 90 days in advance of commencement of non-exempt commercial manufacture, import, or processing.

The recommended tests specified in Unit IV. may not be the only means of addressing the potential risks of the chemical substance. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.
- Potential benefits of the chemical substances.
- Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

IX. Procedural Determinations

By this rule, EPA is establishing certain significant new uses which have been claimed as CBI subject to Agency confidentiality regulations at 40 CFR part 2 and 40 CFR part 720, subpart E. Absent a final determination or other disposition of the confidentiality claim under 40 CFR part 2 procedures, EPA is required to keep this information confidential. EPA promulgated a procedure to deal with the situation where a specific significant new use is CBI, at 40 CFR 721.1725(b)(1).

Under these procedures a manufacturer, importer, or processor may request EPA to determine whether

a proposed use would be a significant new use under the rule. The manufacturer, importer, or processor must show that it has a *bona fide* intent to manufacture, import, or process the chemical substance and must identify the specific use for which it intends to manufacture, import, or process the chemical substance. If EPA concludes that the person has shown a *bona fide* intent to manufacture, import, or process the chemical substance, EPA will tell the person whether the use identified in the *bona fide* submission would be a significant new use under the rule. Since most of the chemical identities of the chemical substances subject to these SNURs are also CBI, manufacturers, importers, and processors can combine the *bona fide* submission under the procedure in § 721.1725(b)(1) with that under § 721.11 into a single step.

If EPA determines that the use identified in the *bona fide* submission would not be a significant new use, i.e., the use does not meet the criteria specified in the rule for a significant new use, that person can manufacture, import, or process the chemical substance so long as the significant new use trigger is not met. In the case of a production volume trigger, this means that the aggregate annual production volume does not exceed that identified in the *bona fide* submission to EPA. Because of confidentiality concerns, EPA does not typically disclose the actual production volume that constitutes the use trigger. Thus, if the person later intends to exceed that volume, a new *bona fide* submission would be necessary to determine whether that higher volume would be a significant new use.

X. SNUN Submissions

According to § 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in §§ 721.25 and 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

XI. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substances subject to this rule. EPA's complete economic analysis is available in the docket under docket ID number EPA–HQ–OPPT–2012–0740.

XII. Statutory and Executive Order Reviews

A. Executive Order 12866

This rule establishes SNURs for several new chemical substances that were the subject of PMNs and, in some cases, TSCA section 5(e) consent orders. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act (PRA)

According to PRA (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA is amending the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act (RAF)

On February 18, 2012, EPA certified pursuant to RFA section 605(b) (5 U.S.C. 601 *et seq.*), that promulgation of a SNUR does not have a significant economic impact on a substantial number of small entities where the following are true:

1. A significant number of SNUNs would not be submitted by small entities in response to the SNUR.

2. The SNUR submitted by any small entity would not cost significantly more than $8,300.

A copy of that certification is available in the docket for this rule.

This rule is within the scope of the February 18, 2012, certification. Based on the Economic Analysis discussed in Unit XI. and EPA's experience promulgating SNURs (discussed in the certification), EPA believes that the following are true:

- A significant number of SNUNs would not be submitted by small entities in response to the SNUR.
- Submission of the SNUN would not cost any small entity significantly more than $8,300.

Therefore, the promulgation of the SNUR would not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this rule. As such, EPA has determined that this rule does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1501 *et seq.*).

E. Executive Order 13132

This action will not have a substantial direct effect on States, on the

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999).

F. Executive Order 13175

This rule does not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This rule does not significantly nor uniquely affect the communities of Indian Tribal governments, nor does it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this rule.

G. Executive Order 13045

This action is not subject to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211

This action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve any technical standards, so NTTAA section 12(d) (15 U.S.C. 272 note) does not apply to this action.

J. Executive Order 12898

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

XIV. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 22, 2012.

Maria J. Doa,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

Therefore, 40 CFR parts 9 and 721 are amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, add the following sections in numerical order under the undesignated center heading ''Significant New Uses of Chemical Substances'' to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
Significant New Uses of Chemical Substances	
* * * * *	
721.10611	2070–0012
721.10612	2070–0012
721.10613	2070–0012
721.10614	2070–0012
721.10615	2070–0012
721.10616	2070–0012
721.10617	2070–0012
721.10618	2070–0012
721.10619	2070–0012
721.10620	2070–0012
721.10621	2070–0012
721.10622	2070–0012
721.10623	2070–0012
721.10624	2070–0012
721.10625	2070–0012
721.10626	2070–0012
721.10627	2070–0012
721.10628	2070–0012
* * * * *	

* * * * *

PART 721—[AMENDED]

■ 3. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

■ 4. Add § 721.10611 to subpart E to read as follows:

§ 721.10611 Benzoic acid, 4-[(1-oxodecyl)oxy]-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as benzoic acid, 4-[(1-oxodecyl)oxy]- (PMN P–11–135, CAS No. 86960–46–5) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) Industrial, commercial and consumer activities. Requirements as specified in § 721.80(f) and (j)

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

■ 5. Add § 721.10612 to subpart E to read as follows:

§ 721.10612 Distillates (lignocellulosic), C5–40.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(6), (b)(concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 6. Add § 721.10613 to subpart E to read as follows:

§ 721.10613 Paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(1), (a)(3), (a)(4), (a)(6), (b) (concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 7. Add § 721.10614 to subpart E to read as follows:

§ 721.10614 Naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(6), (b) (concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to

those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 8. Add § 721.10615 to subpart E to read as follows:

§ 721.10615 Kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(6), (b) (concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90 (a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 9. Add § 721.10616 to subpart E to read as follows:

§ 721.10616 Distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(6), (b) (concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12-branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16-branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and

residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 10. Add § 721.10617 to subpart E to read as follows:

§ 721.10617 Residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (a)(3), (a)(4), (a)(6), (b) (concentration set at 0.1 percent), and (c). The following NIOSH-approved respirators with an APF of 10,000 meet the minimum requirements for § 721.63(a)(4): Any NIOSH-certified pressure-demand or other positive pressure mode (e.g., open/closed circuit) self-contained breathing apparatus (SCBA) equipped with a hood or helmet or a full facepiece.

(A) As an alternative to the respiratory requirements listed in paragraph (a)(2)(i), a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.32 milligram/cubic meter (mg/m^3) as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order.

(B) [Reserved]

(ii) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c), (d), (e)(concentration set at 0.1 percent), (f), and (g).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (Where N=5, and 5 is an aggregate of releases for the following substances: distillates (lignocellulosic), C5–40 (PMN P–11–327, CAS No. 1267611–99–3); paraffin waxes (lignocellulosic) hydrotreated, C5–40—branched, cyclic and linear (PMN P–11–328, CAS No. 1267611–06–2); naphtha (lignocellulosic), hydrotreated, C5–12- branched, cyclic and linear (PMN P–11–329, CAS No. 1267611–35–7); kerosene (lignocellulosic), hydrotreated, C8–16- branched, cyclic and linear (PMN P–11–330, CAS No. 1267611–14–2); distillates (lignocellulosic), hydrotreated, C8–26—branched, cyclic, and linear (PMN P–11–331, CAS No. 1267611–11–9); and residual oils (lignocellulosic), hydrotreated, C20–40- branched, cyclic, and linear (PMN P–11–332, CAS No. 1267611–71–1)).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (h) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 11. Add § 721.10618 to subpart E to read as follows:

§ 721.10618 Polyaromatic organophosphorus compound (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as polyaromatic organophosphorus compound (PMN P–11–607) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the PMN substance after it has been embedded in a solid polymer matrix.

(2) The significant new uses are:

(i) *Hazard communication program.* Requirements as specified in § 721.72(a), (b), (c). (d), (e), (f), (g)(3)(i), (g)(3)(ii), and (g)(4)(iii).

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) and (q).

(iii) *Release to water.* Requirements as specified in § 721.90(a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (f), (g), (h), (i) and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

■ 12. Add § 721.10619 to subpart E to read as follows:

§ 721.10619 Perfluoroalkylethyl methacrylate copolymer (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as perfluoroalkylethyl methacrylate copolymer (PMN P–11–653) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication program.* A significant new use of this substance is any manner or method of manufacture, import, or processing associated with any use of this substance without providing risk notification as follows:

(A) If as a result of the test data required under the TSCA section 5(e) consent order for this substance, the employer becomes aware that this substance may present a risk of injury to human health or the environment, the employer must incorporate this new information, and any information on methods for protecting against such risk, into a Material Safety Data Sheet (MSDS) as described in § 721.72(c) within 90 days from the time the employer becomes aware of the new information. If this substance is not being manufactured, imported, processed, or used in the employer's workplace, the employer must add the new information to a MSDS before the substance is reintroduced into the workplace.

(B) The employer must ensure that persons who will receive the PMN substance from the employer, or who have received the PMN substance from the employer within 5 years from the date the employer becomes aware of the new information described in paragraph (a)(2)(i)(A) of this section, are provided an MSDS containing the information required under paragraph (a)(2)(i)(A) within 90 days from the time the

employer becomes aware of the new information.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(p)(any amount after September 30, 2014).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (f), (h), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 13. Add § 721.10620 to subpart E to read as follows:

§ 721.10620 Oxirane, 2,2′-(phenylene)bis-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as oxirane, 2,2′-(phenylene)bis- (PMN P–12–191, CAS No. 30424–08–9) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j)(distribution of chemical substance with less than or equal to 5 percent impurities).

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (N= 10).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), (i), and (k) are applicable to manufacturers, importers, and processors of this substance,

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this significant new use rule.

■ 14. Add § 721.10621 to subpart E to read as follows:

§ 721.10621 Distillation bottoms, alkylated benzene by-product (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as distillation bottoms, alkylated benzene by-product (PMN P–12–196) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to Water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (N= 1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 15. Add § 721.10622 to subpart E to read as follows:

§ 721.10622 Copper(2+), tetraammine-, chloride (1:2).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as copper(2+), tetraammine-, chloride (1:2) (PMN P–12–285, CAS No. 10534–87–9) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to Water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) (N= 3).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 16. Add § 721.10623 to subpart E to read as follows:

§ 721.10623 Vinylidene ester (generic).

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified generically as vinylidene ester (PMNs P–12–298 and P–12–299) are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(s)(20,000 kilograms of the aggregate of the two chemical substances).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 17. Add § 721.10624 to subpart E to read as follows:

§ 721.10624 Dicyclohexylmethane-4,4'-diisocyanate, polymer with ethoxylated, propoxylated polyethers (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as dicyclohexylmethane-4,4'-diisocyanate, polymer with ethoxylated, propoxylated polyethers (PMN P–12–326) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) (manufacture, processing, or use where the molecular weight is 1000 daltons or more).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 18. Add § 721.10625 to subpart E to read as follows:

§ 721.10625 Distillation bottoms, alkylated benzene by-product, brominated and bromo diphenyl alkane (generic).

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances identified generically as distillation bottoms, alkylated benzene by-product, brominated and bromo diphenyl alkane (PMNs P–12–332 and P–12–333) are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j)(feed for a bromine recovery unit).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

■ 19. Add § 721.10626 to subpart E to read as follows:

§ 721.10626 1,4-Butanediol, polymer with substituted alkane and substituted methylene biscarbomonocycle, 2-hydroxyalkyl acrylate-blocked (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 1,4-butanediol, polymer with substituted alkane and substituted methylene biscarbomonocycle, 2-hydroxyalkyl acrylate-blocked (PMN P–12–373) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o) and (y)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

■ 20. Add § 721.10627 to subpart E to read as follows:

§ 721.10627 Yttrium borate phosphate vanadate with europium and additional dopants (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as yttrium borate phosphate vanadate with europium and additional dopants (PMN P–12–430) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j) and (s).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

■ 21. Add § 721.10628 to subpart E to read as follows:

§ 721.10628 Mixed metal oxalate (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as mixed metal oxalate (PMN P–12–432) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) Industrial, commercial, and consumer activities. Requirements as specified in § 721.80(j) and (s).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a), (b), (c), and (i) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

[FR Doc. 2012–26658 Filed 11–1–12; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 77, No. 213
Friday, November 2, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1158]

Proposed Flood Elevation Determinations for Scotland County, NC, and Incorporated Areas

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Emergency Management Agency (FEMA) is withdrawing its proposed rule concerning proposed flood elevation determinations for Scotland County, North Carolina, and Incorporated Areas.

DATES: This withdrawal is effective on November 2, 2012.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–1158, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: On December 16, 2010, FEMA published a proposed rulemaking at 75 FR 78654, proposing flood elevation determinations along one or more flooding sources in Scotland County, North Carolina. FEMA is withdrawing the proposed rulemaking and intends to publish a Notice of Proposed Flood Hazard Determinations in the **Federal Register** and a notice in the affected community's local newspaper following issuance of a revised preliminary Flood Insurance Rate Map and Flood Insurance Study report.

Authority: 42 U.S.C. 4104; 44 CFR 67.4.

Dated: September 27, 2012.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–26746 Filed 11–1–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1121, 1150, and 1180

[Docket No. EP 714]

Information Required in Notices and Petitions Containing Interchange Commitments

AGENCY: Surface Transportation Board (the Board or STB), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: Through this Notice of Proposed Rulemaking (NPR), the Board is proposing a rule establishing additional disclosure requirements for notices and petitions for exemption where the underlying lease or line sale includes an interchange commitment.

DATES: Comments are due by December 3, 2012. Reply comments are due by January 2, 2013.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 714, 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Amy C. Ziehm at (202) 245–0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Interchange commitments are ''contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.'' [1] Currently, if a proposed acquisition of a rail line involves an interchange commitment, the party filing the notice or petition for exemption must inform the Board that such a provision exists and must file a confidential, complete version of the document containing that provision with the Board.[2]

Historical Regulation of Interchange Commitments

As a result of both the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980, it has become easier for rail carriers to abandon, sell, or lease a line or part of a line by utilizing exemptions from regulatory procedures. This flexibility has helped to revitalize the railroad industry. In 1998, the Board held two days of hearings to examine rail access and competition.[3] The issue of interchange commitments, or paper barriers, arose in the context of shortline railroads. Many of the transactions that created or built up these new shortline railroads contained interchange commitments.[4] The existence of these contractual restrictions encouraged large railroads to sell or lease lighter-density lines at reduced prices (in some cases at no cost), because they were guaranteed to retain a portion of the future revenues from the traffic on those lines. In many instances, they also provided a means of helping to finance the acquisition by shortline railroads. Interchange commitments took varying forms, including lease payment credits for cars interchanged with the seller or lessor carrier (in some instances the lease

[1] *Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League,* EP 575, slip op. at 1 (STB served Oct. 30, 2007). Interchange commitments are sometimes referred to as ''paper barriers.''

[2] *See* 49 CFR 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4).

[3] *Review of Rail Access and Competition Issues,* EP 575 (STB served Apr. 17, 1998).

[4] *Id.* at 8.

credit applied if the lessee interchanged with the lessor up to the same number of cars interchanged with the lessor in the prior year); monetary penalties for traffic interchanged with another railroad; or a total ban on interchange with any carrier other than the seller or lessor carrier.[5] Many reportedly had no fixed termination date.[6]

In September 1998, the American Short Line and Regional Railroad Association and the Association of American Railroads entered into a Railroad Industry Agreement (RIA), which stipulated, among other things, that ''[l]egitimate paper barriers are those that are designed as fair payment for the sale or rental value of the line that created the Short Line.'' [7] In December 1998, the Western Coal Traffic League (WCTL) filed a petition for rulemaking asking the Board to adopt rules of general applicability regarding interchange commitments. The Board deferred action on WCTL's petition in order to allow for industry experience under the RIA.[8]

In 2005, in response to a renewed petition filed by WCTL, the Board initiated a rulemaking proceeding to consider regulations restricting interchange commitment provisions included with a sale or lease of a rail line.[9] WCTL argued that interchange commitments were anticompetitive because they prevented lessee/purchaser railroads from offering shippers the full array of competitive routing options. WCTL asked the Board to establish a rebuttable presumption that such provisions are unreasonable and contrary to the public interest if they (a) Last longer than five years, (b) include any financial penalty for interchanging traffic with another carrier, or (c) include a credit for interchanging traffic with the seller or lessor railroad that would provide a return in excess of the railroad industry's cost of capital.[10] Upon receiving comments and conducting a public hearing, the Board declined to adopt a single rule of general applicability, deciding instead to consider the propriety of interchange commitments on a case-by-case basis.[11] The Board indicated that it would give especially close scrutiny to those interchange commitments that totally ban the lessee/purchasing railroad from interchanging with a third party carrier, and those commitments that were not time-limited.[12]

To facilitate its review of transactions that include interchange commitments, the Board proposed new disclosure requirements in 2007 to ensure appropriate advance regulatory scrutiny of sale and lease agreements containing interchange commitments,[13] and in May 2008, the Board formally adopted the proposed rules.[14] Thus, a purchaser or lessee railroad filing a notice or petition for exemption must advise the Board if the sale or lease contract includes an interchange commitment and must file a confidential, unredacted copy of that contract and any related documents containing the terms of the interchange commitment with the Board.[15]

Since its May 2008 decision adopting disclosure rules, the Board has reviewed 10 notices or petitions for exemption involving interchange commitments.[16] In the majority of these cases, the interchange commitment was styled as a lease credit for cars interchanged with the seller or lessor.[17] At least one, however, involved a total ban on interchanges with any other railroad.[18]

The Board and interested parties have availed themselves of the information required in transactions containing interchange commitments. For instance, in four of those cases, third parties filed petitions to revoke the exemptions based on the interchange commitment.[19] In another case, the Board, on its own initiative, rejected the notice of exemption because the rail carrier had not filed a complete copy of the lease contract as required by our regulations.[20]

In this rulemaking, the Board proposes to require that additional information be provided in notices and petitions for exemption to include, among other things, specific details regarding the impact the interchange commitment will have on shippers and the purchaser or lessee railroad. The Board's goal is to ensure that both the agency and other interested parties have sufficient information to judge whether the exemption process is appropriate for a transaction. In particular, because the notice of exemption process involves very short deadlines, the Board proposes to require disclosure of information about the transaction at the time of the notice itself, rather than during any subsequent requests to reject or revoke the exemption.

The Proposed Rule: The Board proposes to revise its rules at 49 CFR 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4) to require that the filing

[5] *Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League,* EP 575, slip op. at 4 (STB served Oct. 30, 2007).

[6] *Id.*

[7] Railroad Industry Agreement § III, Paper Barriers (Sept. 10, 1998).

[8] *Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League,* EP 575, slip op. at 5–6 (STB served Oct. 30, 2007).

[9] *See generally id.*

[10] The cost of capital is the Board's estimate of the average rate of return needed to persuade investors to provide capital to the freight rail industry. *See Railroad Cost of Capital—2011,* EP 558 (Sub-No. 15) (STB served Sept. 13, 2012).

[11] *Review of Rail Access and Competition Issues—Renewed Petition of the W. Coal Traffic League,* EP 575, slip op. at 13 (STB served Oct. 30, 2007).

[12] *Id.* at 15.

[13] *See generally id.*

[14] *Disclosure of Rail Interchange Commitments,* EP 575 (Sub-No. 1) (STB served May 29, 2008).

[15] *Id.*

[16] *Midwest Rail d/b/a Toledo, Lake Erie and W. Ry —Lease & Operation Exemption—Norfolk S. Ry.,* FD 35634 (STB served June 29, 2012) (Mulvey, commenting); *Progressive Rail—Lease & Operation Exemption—Rail Line of Union Pac. R.R.,* FD 35617 (STB served May 4, 2012) (Mulvey, dissenting); *Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35412 (STB served Sept. 23, 2011) (Mulvey, dissenting); *E. Penn R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35533 (STB served July 15, 2011) (Mulvey, dissenting); *C&NC R.R.—Lease Renewal Exemption—Norfolk S. Ry.,* FD 35529 (STB served July 1, 2011) (Mulvey, dissenting); *Adrian & Blissfield R.R.—Continuance in Control Exemption—Jackson & Lansing R.R.,* FD 35410 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35411 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R.—Trackage Rights Exemption—Norfolk S. Ry.,* FD 35418 (STB served Oct. 6, 2010) (Mulvey, dissenting); *N. Plains R.R.—Lease Exemption—Soo Line R.R.,* FD 35382 (STB served Aug. 6, 2010) (Mulvey, dissenting); *Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry.,* FD 35370 (STB served Apr. 23, 2010) (Mulvey, dissenting).

[17] *Midwest Rail d/b/a Toledo, Lake Erie and W. Ry.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35634 (STB served June 29, 2012) (Mulvey, commenting); *Progressive Rail—Lease & Operation Exemption—Rail Line of Union Pac. R.R.,* FD 35617 (STB served May 4, 2012) (Mulvey, dissenting); *Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35412 (STB served Sept. 23, 2011) (Mulvey, dissenting); *E. Penn R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35533 (STB served July 15, 2011) (Mulvey, dissenting); *C&NC R.R.—Lease Renewal Exemption—Norfolk S. Ry.,* FD 35529 (STB served July 1, 2011) (Mulvey, dissenting); *Adrian & Blissfield R.R.—Continuance in Control Exemption—Jackson & Lansing R.R.,* FD 35410 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35411 (STB served Oct. 6, 2010) (Mulvey, dissenting); *Jackson & Lansing R.R.—Trackage Rights Exemption—Norfolk S. Ry.,* FD 35418 (STB served Oct. 6, 2010) (Mulvey, dissenting).

[18] *Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry.,* FD 35370 (STB served Apr. 23, 2010) (Mulvey, dissenting).

[19] *Adrian & Blissfield R.R.—Continuance in Control Exemption—Jackson & Lansing R.R.,* FD 35410 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Jackson & Lansing R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35411 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Jackson & Lansing R.R.—Trackage Rights Exemption—Norfolk S. Ry.,* FD 35418 (STB served Sept. 27, 2011) (Mulvey, dissenting); *Middletown & N.J. R.R.—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35412 (STB served Sept. 23, 2011) (Mulvey, commenting).

[20] *Wash. & Idaho Ry.—Lease & Operation Exemption—BNSF Ry.,* FD 35370 (STB served Apr. 23, 2010) (Mulvey, dissenting).

party affirmatively disclose whether or not the underlying agreement contains an interchange commitment. The Board further proposes to revise those rules to require that the following information be included in notices and petitions for exemption involving an interchange agreement:

(1) A list of shippers that currently use or have used the line in question within the last two years;

(2) The number of carloads those shippers specified in paragraph (1) originated or terminated (submitted under seal);

(3) A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (1);

(4) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(5) The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);

(6) An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);

(7) An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

(8) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

The Board's goal is to encourage transactions that are in the public interest, while ensuring that it has sufficient information about transactions to determine whether they are appropriate for the exemption process or, on the other hand, raise competitive issues that require a more detailed examination. The Board has already indicated that interchange commitments that last in perpetuity or completely eliminate the ability of the lessee/purchaser railroad to interchange with a third-party carrier raise significant concerns. Long-term interchange commitments, often embodied in lengthy, renewable leases, also have the potential to control the competitive environment—thus affecting rates and service—for years to come. To this end, the Board believes that it will benefit the parties to the transaction, shippers, and the public for the Board to be provided with the above-outlined information simultaneously with the filing of a notice or petition for exemption. This additional information will aid the Board in its review of petitions for and notices of exemption and allow the Board to evaluate contracts involving interchange commitments without the delay involved with seeking additional information. Furthermore, parties objecting to a petition for exemption or those filing a petition to revoke an exemption will have access to this relevant information up front, thus minimizing the length of time spent on the process of filing and deciding a petition to revoke.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities.'' § 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The regulations proposed here would affect railroads negotiating contracts that contain interchange commitments. As noted below, the Board estimates that a total of four respondents will be affected by these additional reporting requirements annually, and that the additional time required by each respondent is no more than eight hours. The Board believes that an additional eight hours in the context of putting together the relevant documents and filings does not create a significant impact. Moreover, as only four respondents per year will be affected, the proposed rule would not impact a substantial number of small entities.[21] Accordingly, pursuant to 5 U.S.C. 605(b), the Board certifies that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3549, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), the Board seeks comments regarding: (1) Whether the collection of information as modified in the proposed rule and further described in Appendix B, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Information pertinent to these issues is included in Appendix B. The modified collection in this proposed rule will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

This rulemaking will affect the following subject: Parts 1121, 1150, and 1180 of title 49, chapter X, of the Code of Federal Regulations. It is issued subject to the Board's authority under 49 U.S.C. 721(a).

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the **Federal Register**.

2. Comments are due by December 3, 2012. Reply comments are due by January 2, 2013.

3. This decision is effective on the day of service.

List of Subjects

49 CFR Part 1121

Administrative practice and procedure, Railroads.

49 CFR Part 1150

Administrative practice and procedure, Railroads.

49 CFR Part 1180

Administrative practice and procedure, Railroads, Reporting and record keeping requirements.

Decided: October 29, 2012.

[21] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of small business. *See* 13 CFR 121.201. The SBA has established a size standard for rail transportation, stating that a line-haul railroad is considered small if its number of employees is 1,500 or less, and that a shortline railroad is considered small if its number of employees is 500 or less. *Id.* (subsector 482).

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey commented with a separate expression.

Vice Chairman Mulvey, commenting:

I commend the Board for proposing additional rules and soliciting comments regarding interchange commitment disclosures requirements. As explained in the decision, the goal of the proposed rules is to provide the Board and interested parties early access to a wide range of information regarding newly proposed interchange commitments. The impact of interchange commitments on competition remains a serious concern for many stakeholders. As we continue to grapple with questions raised by interchange commitments established decades ago, the Board must also be vigilant about the impact of any new restrictions on competition. In responding to the proposed rules, I hope that stakeholders will assist the Board in crafting a regime that provides appropriate scrutiny to transactions that have the potential to adversely impact competition.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1121, 1150, and 1180 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1121—RAIL EXEMPTION PROCEDURES

1. The authority citation for part 1121 continues to read as follows:

Authority: 49 U.S.C. 10502 and 10704.

2. Amend § 1121.3 by revising paragraph (d)(1) introductory text and by adding paragraphs (d)(1)(iii) through (x) to read as follows:

§ 1121.3 Content.

* * * * *

(d) *Interchange commitments.* (1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (''interchange commitment''). If such a provision exists, the following additional information must be provided:

* * * * *

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The number of carloads those shippers specified in paragraph (d)(1)(iii) of this section originated or terminated (submitted under seal);

(v) A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (d)(1)(iii) of this section;

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);

(viii) An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);

(ix) An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

(x) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

* * * * *

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

3. The authority citation for part 1150 continues to read as follows:

Authority: 49 U.S.C. 721(a), 10502, 10901, and 10902.

4. Amend § 1150.33 by revising paragraph (h)(1) introductory text and by adding paragraphs (h)(1)(iii) through (x) to read as follows:

§ 1150.33 Information to be contained in notice—transactions that involve creation of Class III carriers.

* * * * *

(h) *Interchange commitments.* (1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (''interchange commitment''). If such a provision exists, the following additional information must be provided:

* * * * *

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The number of carloads those shippers specified in paragraph (iii) originated or terminated (submitted under seal);

(v) A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (iii);

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);

(viii) An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);

(ix) An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

(x) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

* * * * *

5. Amend § 1150.43 by revising paragraphs (h)(1) introductory text and by adding paragraphs (h)(1)(iii) through (x) to read as follows:

§ 1150.43 Information to be contained in notice for small line acquisitions.

* * * * *

(h) *Interchange commitments.* (1) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (''interchange commitment''). If such a provision exists, the following additional information must be provided:

* * * * *

(iii) A list of shippers that currently use or have used the line in question within the last two years;

(iv) The number of carloads those shippers specified in paragraph (h)(1)(iii) of this section originated or terminated (submitted under seal);

(v) A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (h)(1)(iii) of this section;

(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(vii) The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);

(viii) An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);

(ix) An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

(x) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

* * * * *

PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

6. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323–11325.

7. Amend § 1180.4 by revising paragraph (g)(4)(i) introductory text and by adding paragraphs (g)(4)(i)(C) through (J) to read as follows:

§ 1180.4 Procedures.

* * * * *

(g) * * *

(4) *Interchange commitments.* (i) The filing party must certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (''interchange commitment''). If such a provision exists, the following additional information must be provided:

(C) A list of shippers that currently use or have used the line in question within the last two years;

(D) The number of carloads those shippers specified in paragraph (g)(4)(i)(C) of this section originated or terminated (submitted under seal);

(E) A certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (g)(4)(i)(C) of this section;

(F) A list of third party railroads that could physically interchange with the line sought to be acquired or leased;

(G) The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);

(H) An estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);

(I) An estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

(J) A change in the case caption so that the existence of an interchange commitment is apparent from the case title.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

Description of Collection

Title: Disclosure of Rail Interchange Commitments.

OMB Control Number: 2140–0016.

STB Form Number: None.

Type of Review: Revision of an approved collection.

Respondents: Noncarriers and carriers seeking an exemption to acquire (through purchase or lease) and/or operate a rail line, if the proposed transaction includes an interchange commitment.

Number of Respondents: Four.

Estimated Time per Response: No more than eight hours.

Frequency: On occasion.

Total Burden Hours (annually including all respondents): 32 hours.

Total ''Non-hour Burden'' Cost: None identified. Respondents may file the requested information electronically.

Needs and Uses: Under 49 U.S.C. 10502, noncarriers and carriers may seek an exemption from the prior approval requirements of sections 10901, 10902, and 11323 to acquire (through purchase or lease) and operate a rail line. The collection of agreements with interchange commitments has facilitated the case-specific review of interchange commitments and the Board's monitoring of their usage generally. The modifications proposed here will further ensure that the Board has sufficient information about these transactions to determine whether they are appropriate for the exemption process and will also help parties objecting to a petition for exemption or filing a petition to revoke an exemption by providing access to this relevant information up front, thus minimizing the length of time spent on the process of filing and deciding a petition to revoke.

Retention Period: Information in this report will be maintained in the Board's confidential file for 10 years, after which it is transferred to the National Archives.

[FR Doc. 2012–26882 Filed 11–1–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120822383–2383–01]

RIN 0648–BC48

Fisheries of the Northeastern United States; Northeast Multispecies Fishery Management Plan; Amendment 19

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 19 to the Northeast Multispecies Fishery Management Plan, if approved. The New England Fishery Management Council developed Amendment 19 to modify management measures that currently govern the small-mesh multispecies fishery, including the accountability measures, the year-round possession limits and total allowable landings process.

DATES: Written comments must be received no later than 5 p.m. eastern standard time, on December 3, 2012.

ADDRESSES: An environmental assessment (EA) was prepared for Amendment 19 that describes the proposed action and other considered alternatives, and provides an analysis of the impacts of the proposed measures and alternatives. Copies of the Amendment, including the EA and the Initial Regulatory Flexibility Analysis (IRFA), are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.*

You may submit comments, identified by NOAA–NMFS–2012–0170, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon,

then enter ''NOAA–NMFS–2012–0170'' in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.

• *Fax:* (978) 281–9135, Attn: Moira Kelly.

• *Mail:* John Bullard, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on Whiting Amendment 19.''

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov*. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

SUPPLEMENTARY INFORMATION:

Background

Amendment 19 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) affects the part of the New England groundfish fishery known as the small-mesh fishery. The small-mesh fishery is composed of a complex of five stocks of three species of hakes (northern silver hake, southern silver hake, northern red hake, southern red hake, and offshore hake), and is managed through a series of exemptions from the other provisions of the NE Multispecies FMP. It is managed separately from the other stocks of groundfish such as cod, haddock, and flounder, primarily because it is prosecuted with much smaller mesh and does not generally result in the catch of these other stocks.

The New England Fishery Management Council (Council) initiated Amendment 19 to bring the small-mesh multispecies portion of the NE Multispecies FMP into compliance with the annual catch limit (ACL) and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). However, development of Amendment 19 was delayed, and it became apparent that the amendment would not be submitted until well after the 2011 statutory deadline for implementing mechanisms for establishing ACLs and AMs. To ensure that ACLs and AMs for the small-mesh fishery were implemented closer to the statutory deadline, NOAA initiated, developed, and implemented, with the concurrence of the Council, a Secretarial Amendment on March 30, 2012 (77 FR 19138). The Secretarial Amendment was based on the preliminary work the Council completed up to that point, including the overfishing limits (OFL), acceptable biological catches (ABC), and ACLs.

The Council, through Amendment 19, is adopting those limits (Table 1) and the process that describes how those values are calculated as implemented in the Secretarial Amendment. As described in the Secretarial Amendment, the ABCs are based on the OFLs and, to account for scientific uncertainty, are set equal to the 40th percentile of the OFL distribution for both red hake stocks, and the 25th percentile for both silver hake stocks. In order to account for offshore hake, which are caught incidentally in the southern silver hake fishery and are marketed together as ''whiting,'' the southern silver hake ABC is increased by 4 percent. The ACLs are then set equal to 95 percent of the respective ABC, to account for management uncertainty.

TABLE 1—OFL, ABC, AND ACL FOR 2012–2014

	Northern red hake	Northern silver hake	Southern red hake	Southern whiting
Overfishing Limit (OFL)	314 mt	24,840 mt	3,448 mt	62,301 mt
Acceptable Biological Catch (ABC)	280 mt	13,177 mt	3,259 mt	33,940 mt
Annual Catch Limit (ACL)	266 mt	12,518 mt	3,096 mt	32,295 mt

However, in Amendment 19, the Council recommended changes to some measures implemented in the Secretarial Amendment, as well as changes to management measures that the Secretarial Amendment did not address. This rule proposes these changes, which are discussed in detail below.

Proposed Measures

1. Revised Overfishing Definitions

The overfishing definitions were derived from the most recent stock assessment for the small-mesh multispecies that was conducted in November 2010 (SAW 51). The Council prefers using the new overfishing definitions because they are based on the best available science. There is no overfishing definition for offshore hake because there is insufficient information for a stock assessment. The proposed new overfishing definitions for red hake and silver hake would be as follows:

Red Hake

Red hake is overfished when the 3-yr moving arithmetic average of the spring survey weight per tow (i.e., the biomass threshold) is less than one-half of the B_{MSY} proxy, where the B_{MSY} proxy is defined as the average observed from 1980–2010. The current estimates of the biomass thresholds for the northern and southern stocks are 1.27 kg/tow and 0.51 kg/tow, respectively.

Overfishing occurs when the ratio between catch and spring survey biomass exceeds 0.163 kt/kg and 3.038 kt/kg, respectively, derived from An Index Method (AIM) analyses from 1980–2009.

Silver Hake

Silver hake is overfished when the 3-yr moving average of the fall survey weight per tow (i.e., the biomass threshold) is less than one-half the B_{MSY} proxy, where the B_{MSY} proxy is defined as the average observed from 1973–1982. The most recent estimates of the biomass thresholds are 3.21 kg/tow for the northern stock and 0.83 kg/tow for the southern stock.

Overfishing occurs when the ratio between the catch and the arithmetic mean fall survey biomass index from the most recent three years exceeds the overfishing threshold. The most recent

estimates of the overfishing threshold are 2.78 kt/kg for the northern stock, and 34.19 kt/kg for the southern stock of silver hake.

2. *Adjustments to the Specifications Process, Changes to the List of Measures Adjustable by Framework and Monitoring Procedures and Requirements*

This rule proposes to modify the specifications process and the list of measures that may be changed in a Framework Adjustment implemented by the Secretarial Amendment, and also proposes to modify the process by which the fishery is monitored. The proposed specifications process would specify the date by which the Council would need to make a recommendation on the catch limits, possession limits, and other measures deemed to be part of the specifications package. In addition, the list of items that could be considered for adjustment in a framework would be modified slightly.

This rule also proposes a measure that would require NMFS to prepare, and the appropriate Council technical group (such as a plan development team (PDT)) to review, a report on the small-mesh multispecies fishery, including trends in the fishery and changes in stock size. The PDT would be responsible for making recommendations to the Council, should any management changes be deemed necessary.

Finally, this rule proposes to require vessels fishing for small-mesh multispecies to send their vessel trip reports (VTRs) to NMFS on a weekly basis. Amendment 16 to the NE Multispecies FMP implemented the requirement that vessels fishing with a NE multispecies permit have a weekly VTR requirement; however, that amendment had no other small-mesh multispecies measures associated with it. As a result, the Council and the Whiting Oversight Committee wanted to ensure that the weekly submission of VTRs is a requirement for small-mesh multispecies vessels through this action, in order to facilitate more effective monitoring of the stock-area based TALs.

3. Stock Area Total Allowable Landings

The Secretarial Amendment implemented annual, stock-wide TALs for northern and southern red hake, as well as for northern silver hake and southern ''whiting'' (i.e., silver and offshore hake, combined). The TALs are calculated by deducting the most recent 3-year moving average of discards from the ACL. From that resulting value, 3 percent is deducted to account for state-waters landings.

TABLE 2—2012–2014 TOTAL ALLOWABLE LANDINGS

	Northern red hake	Northern silver hake	Southern red hake	Southern whiting
ACL	266 mt	12,518 mt	3,096 mt	32,295 mt
Discard Estimate (2008–2010)	65% (173 mt)	26% (3,255 mt)	56% (1,718 mt)	13% (4,198 mt)
State-Waters Landings (3%)	2.8 mt	278 mt	42 mt	842 mt
Federal TAL (mt)	90.3 mt	8,985 mt	1,336 mt	27,255 mt
Federal TAL (lb)	199,077.4 lb	19,809,243 lb	2,945,376 lb	60,086,990 lb

This rule proposes to maintain the annual, stock-wide TAL for the northern area, instead of the other considered alternative of sub-dividing the TALs by exemption area. The annual, stock-wide TAL was the Council's preferred alternative because it would be less costly to monitor and the small-mesh exemption area targets may not provide the intended benefits of ensuring full trip limits for the different fleets that fish seasonally in the exemption areas.

In the southern stock area, the TALs would be monitoring annually initially, until two-thirds of a TAL is harvested in a given year. The Council prefers this alternative to implementing quarterly TALs at this time because the quarterly allocations are unnecessary unless and until landings begin to approach the TALs. In addition, the quarterly TALs, as opposed to the annual quota, would, if implemented, prevent long directed fishery closures, possibly affecting the ability to target whiting in the winter and spring.

If landings in a given year exceed two-thirds of the TAL, NMFS would consult with the Council during the following year, and if the Council agrees, NMFS would implement a rule to switch the TAL to a quarterly system for the next year. For example, if two-thirds of the red hake TAL were landed in 2013, and the Council agreed, the quarterly TALs would be implemented for the start of the 2015 fishing year and would be maintained until the Council chooses, through specifications or a Framework Adjustment, to revert back to an annual TAL. The incidental possession limit trigger (as described in the in-season AM section, below) would be applied for each quarter. The quarterly allocations would be based on the average proportion of dealer-reported landings from 2008–2010, as follows:

TABLE 3—QUARTERLY ALLOCATIONS FOR THE SOUTHERN STOCK AREA

	May–Jul	Aug–Oct	Nov–Jan	Feb–Apr
Southern Red Hake	33.3%	25.3%	17.7%	23.7%
Southern Whiting	27%	21.4%	22.8%	28.8%

Included in this proposed measure is a ''roll-up'' procedure that would be used for in-season monitoring of the quarterly TALs. In each quarter, the cumulative landings to date that fishing year would be monitored against a quarterly TAL represented by the sum of that quarter's allocation, plus the allocations from prior quarters (e.g., during quarter 2, the cumulative landings of southern red hake to date would be monitored against a quota equal to 58.6 percent of the annual TAL, which is the sum of the quarter 1 allocation of 33.3 percent plus the quarter 2 allocation of 25.3 percent). The possession limit trigger for each stock would apply in each quarter when cumulative landings reach 90 percent of the rolled-up quarterly allocation, and the incidental possession limit would remain in effect until the end of that quarter. At the start of the next quarter, the possession limit would reset to the

appropriate default possession limit. This procedure allows for unused quota from a quarter to be available immediately to the fleet, without unnecessary delays from rulemaking to formally transfer quota between quarters.

4. Accountability Measures

The Secretarial Amendment implemented two types of AMs for the small-mesh multispecies fishery. The in-season AM would reduce the possession limit to an incidental amount for a stock if 90 percent of that stock's TAL were projected to be harvested. For both red hake stocks, the possession limit would be reduced to 400 lb (181.4 kg), and for northern silver hake and southern whiting, the possession limit would be reduced to 1,000 lb (453.6 kg). In the event that an ACL is exceeded in a given year, the post-season AM implemented in the Secretarial Amendment would reduce a subsequent year's ACL by the exact amount, by weight, by which the ACL were exceeded. For example, if an ACL in fishing year 2013 were exceeded by 15,000 lb (6,803. 9 kg), the ACL for that stock in fishing year 2015 would be reduced by 15,000 lb (6,803.9 kg).

In-Season AMs

This rule proposes to maintain the overall structure of the in-season AM (i.e., the 90-percent trigger, with a reduced possession limit), but proposes to change the incidental possession limit for northern silver hake and southern whiting. This rule proposes to maintain the 400-lb (181.4-kg) incidental possession limit for red hake and to raise the incidental possession limit for silver and offshore hake, combined, from 1,000 lb (453.6 kg) to 2,000 lb (907.2 kg). This limit is proposed because analysis by the Whiting PDT indicates that it is likely to be effective in keeping landings below the TAL, without increasing discards. There is no meaningful contrast in the effectiveness of lower incidental possession limits, but the lower incidental possession limits are estimated to cause an unacceptable increase in discards.

Post-Season AM

This rule proposes to replace the post-season AM implemented by the Secretarial Amendment, described above, with a post-season AM that would decrease the TAL trigger by the same percentage by which the ACL were exceeded. That is, if an ACL were exceeded by 5 percent in fishing year 2013, the incidental possession limit trigger of 90 percent would be reduced by 5 percent to 85 percent, starting in fishing year 2015. This reduction in the TAL trigger would remain in effect until the Council chooses to modify it through the specifications process or in a framework adjustment. This AM is intended to permanently account for the management uncertainty that caused the overage. The Council chose this AM because it more directly reduces the trips targeting small-mesh multispecies, and, as a result, the overall landings by the directed fishery.

5. Trip Limits

Currently, there is no year-round possession limit for red hake in both the northern or southern stock area, and the possession limit for silver and offshore hake, combined, is based on mesh size throughout the region. This rule proposes changes to both of these management measures.

Red Hake

This rule is proposing to implement a 5,000-lb (2,268-kg) trip limit for red hake in both the northern and southern stock areas for all gear types. The Council had considered mesh-size based trip limits, similar to silver hake, but prefers the same trip limit for all gear types because it is more enforceable and compliance would likely be higher. The intention of this trip limit is to prevent significant increases in catch beyond what is currently landed. Analysis shows that no trips from 2008–2010 landed more than 5,000 lb (2,268 kg), so the measure is unlikely to restrict existing fishing effort, but is intended to act as a deterrent to increasing fishing effort to target red hake.

Southern Whiting

This rule proposes to increase the southern whiting (southern silver hake and offshore hake, combined) trip limit from 30,000 lb (13,607.8 kg) to 40,000 lb (18,143.7 kg) for vessels fishing in the Southern New England and Mid-Atlantic Exemption Areas using mesh that is 3 inches (7.6 cm) or greater. The Council had considered implementing this trip limit increase in only a portion of the southern exemption areas; however, as a result of public comment and enforceability concerns, the Council prefers that the increase be applicable throughout the southern area. The Council selected a 40,000-lb (18,143.7-kg) possession limit to retain the delicate balance between allowing a moderate increase in landings while trying not to attract excessive fishing effort to an open access fishery, which could cause landings to rapidly increase and potentially cause the incidental possession limit to be triggered earlier in the fishing year. The Council also constrained this possession limit increase to vessels using trawls having 3-inch (7.6 cm) or larger mesh to maintain optimum size selectivity by the fishery and discourage increases in fishing for smaller whiting.

As required under section 303(c) of the Magnuson-Stevens Act, the Council reviewed the draft regulations and deemed them necessary and appropriate for implementation of Amendment 19. Technical changes to the regulations deemed necessary by the Secretary for clarity may be made, as provided under section 304(b) of the Magnuson-Stevens Act.

Other Regulatory Changes

NMFS is proposing to clarify some of the regulations governing the small-mesh multispecies fishery through this rulemaking. The proposed language of the regulations pertaining to the small-mesh multispecies exemption programs would clarify that only a raised footrope trawl is allowed in the Small Mesh Area I and II Exemption Programs, and the Gulf of Maine Grate Raised Footrope Trawl Area Exemption Program, and that no other fishing gears are permitted to be used while a vessel is fishing in these exemption programs. NMFS is also proposing language to clarify the incidental catch limits for other species in the small-mesh multispecies exemption programs by adding the citation for each species, as appropriate. NMFS is also proposing to correct an incorrect citation in the regulations pertaining to small-mesh multispecies transfers-at-sea.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has preliminarily determined that this proposed rule is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

The Office of Management and Budget has determined that this proposed rule is not significant for the purposes of Executive Order 12866.

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA), which is included in Amendment 19 and supplemented by information contained in the preamble to this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this

action are contained at the beginning of this section of the preamble and in the **SUMMARY** of this proposed rule. A summary of the IRFA follows. A copy of this analysis is available from the Council's Executive Director (see **ADDRESSES**).

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration size standards for small fishing businesses ($4.0 million in annual gross sales). Therefore, there are no disproportionate effects on small versus large entities. Information on costs in the fishery is not readily available and individual vessel profitability cannot be determined directly; therefore, expected changes in gross revenues were used as a proxy for profitability.

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

Description and Estimate of Number of Small Entities To Which the Rule Would Apply

In order to fish for small-mesh multispecies, a vessel owner must be issued either a limited access NE multispecies permit or an open access category K NE multispecies permit; however, there are many vessels issued both of these types of permits that may not actually fish for small-mesh multispecies. Although some firms own more than one vessel, available data make it difficult to reliably identify ownership control over more than one vessel. For this analysis, the number of permitted vessels landing small-mesh multispecies is considered to be a maximum estimate of the number of small business entities that may be impacted. The average number of permitted vessels landing at least 1 lb (0.5 kg) of silver hake or red hake from 2005–2010 was 562 vessels per year.

Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives

In general, the economic impacts of the proposed actions vary from positive to slightly negative, compared to the status quo/no action alternatives and the other alternatives considered. The proposed measures that have positive economic impacts include the specifications process; including the modification of the southern area TAL structure that would implement quarterly TALs if two-thirds of the TAL is landed; both year-round trip limit alternatives are expected to result in positive economic impacts. The proposed AMs are more likely to result in slightly negative impacts, if triggered. Although analysis indicates that the preferred post-season AM of a percent reduction in the incidental possession limit trigger would have a less negative impact than the status quo.

The proposed alternatives that would most likely have an impact in the foreseeable future is the status quo alternative that proposed to maintain 90-percent trigger AM for northern red hake with a 400-lb (181.4-kg) incidental possession limit, as was described in the Secretarial Amendment. Using vessel trip report data from 2006–2010, a 400-lb (181.4-kg) incidental possession limit in the northern stock area, implemented when 90 percent of the northern red hake TAL is projected to be harvested, would have impacted approximately 23 trips per year, and an average of 7 vessels per year. At a loss of approximately $282 per trip, this AM would have cost the fleet $6,486 per year in lost northern red hake revenue. This may not be a true revenue loss, however. Red hake is rarely the primary target species and vessel owners are likely to shift effort onto another routinely landed incidental species, such as skates or dogfish, to finish their trip. The other in-season AM alternatives considered for this amendment included incidental possession limits of 200 lb (90.7 kg) or 300 lb (136.1 kg). Both of these alternatives would have an increased negative impact, affecting more trips than the 400-lb (181.4-kg) possession limit. Furthermore, the long-term impacts would likely be negative for these alternatives as well, due to increased discarding. The impacts from alternatives for the in-season AM for northern silver hake, southern whiting, and southern red hake are difficult to quantify because the TALs are significantly higher than recent catch and they are unlikely to be implemented. For southern red hake, the proposed alternative is the status quo alternative and for southern whiting and northern silver hake, the proposed alternative is an increase in the incidental trip limit from 1,000 lb (453.6 kg) to 2,000 lb (907.2 kg). In general, the lower incidental trip limits (200 and 300 lb (90.7 and 136.1 kg) for red hake; and 500 and 1,000 lb (226.8 and 453.6 kg) for southern whiting and northern silver hake) can be assumed to have a more negative economic impact than the higher incidental trip limits (400 lb (181.4 kg) for southern red hake, and 2,000 lb (907.2 kg) for southern whiting and northern red hake).

Another alternative that may have impact in the near-future is the post-season AM for northern red hake. The status quo alternative would implement a pound-for-pound payback system for any overage. The proposed alternative would reduce the incidental possession limit trigger by the same percentage by which the ACL was exceeded. As an example, the 2010 fishing year northern red hake catch exceeds the ACL and can be used to illustrate the potential impacts of the two alternatives. Northern red hake catch was 311 mt in 2010, 17% or 45 mt above the fishing year 2012 ACL of 266 mt. For this example, we assume that the discard rate and state water landings proportion remain constant. Assuming that the discard rate and state waters portion remain constant, the status quo alternative results in a TAL of 144,094 lb (65.4 mt), with a 90 percent incidental trigger limit of 129,685 lb (58.8 mt). The proposed alternative, on the other hand results in a TAL of 199,077 lb (90.3 mt), with a 73 percent incidental trigger limit of 145,326 lb (65.9 mt). This example demonstrates that the reduction in the possession limit trigger would have a less negative impact on the fleet than the status quo alternative of a pound-for-pound payback because it provides for a higher directed fishery target.

TABLE 4—COMPARISON OF POST-SEASON AM ALTERNATIVES

	Pound-for-pound payback (status quo)	Incidental possession limit trigger reduction (proposed)
Original ACL	266 mt	266 mt
Overage	45 mt	17%
Adjusted ACL	221 mt	n/a
Discards (65%)	143.65 mt	173 mt

TABLE 4—COMPARISON OF POST-SEASON AM ALTERNATIVES—Continued

	Pound-for-pound payback (status quo)	Incidental possession limit trigger reduction (proposed)
Landings Limit (State + Federal)	67.35 mt	93 mt
State Landings (3%)	2 mt	2.8 mt
Federal TAL	65.4 mt	90.3 mt
Incidental Trigger Limit	(90%) 58.8 mt	(73%) 65.9 mt

Because the current TAL is significantly higher than recent catch for southern red hake, northern silver hake, and southern whiting, it is difficult to quantify the impact that either the status quo or the possession limit trigger reduction would have. However, it can be assumed that the impacts would be similar to those described above.

It is expected that the year-round possession limit changes would also have an immediate economic impact. The year-round red hake limit of 5,000 lb (2268 kg), versus the status quo alternative of an unlimited possession limit, is intended to act as a restriction on potential increases in red hake landings, and very few recent trips would have been impacted by this trip limit. It is possible that there could be a negative effect on the price of red hake if vessels start landing larger quantities, which is possible under the status quo of no trip limit in this open access fishery. It is expected that this alternative would help maintain a satisfactory price for red hake and have a positive economic impact, as opposed to the other, lower possession limits considered in the Amendment.

In addition, the increase in the southern whiting possession limit for vessels using mesh that is 3 inches (7.6 cm) or greater is also expected to have a positive economic impact for vessels fishing in the southern area, but may have a slightly negative economic impact for vessels fishing in the northern area. If the possession limit is increased in the southern area, there may be a reduced demand, and therefore a reduced price, for whiting. This reduced price would be offset by the increased volume for vessels fishing in the southern area, but would not be offset for vessels fishing in the northern area. Analysis indicates that increasing daily landings could cause a decline of 0.6 cents for each 1-percent increase in landings. Therefore, the revenue for a 30,000-lb (13607.8-kg) trip in the northern stock area would decline by approximately $450, while the revenue for a southern area trip landing 40,000 lb (18143.7 kg) of whiting would increase by $5,318. The other alternatives considered for this measure would limit the increase to a portion of the southern area, which would have less economic benefit than the proposed alternative. The status quo alternative would not increase the trip limit and would be less economically beneficial than the proposed alternative.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: October 25, 2012.

Paul N. Doremus,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.7, paragraph (f)(2)(i) is revised to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(f) * * *

(2) *Fishing vessel log reports.* (i) For any vessel not issued a NE multispecies permit, Atlantic herring permit, or Tier 3 Limited Access mackerel permit, fishing vessel log reports, required by paragraph (b)(1)(i) of this section, must be postmarked or received by NMFS within 15 days after the end of the reporting month. If no fishing trip is made during a particular month for such a vessel, a report stating so must be submitted, as instructed by the Regional Administrator. For any vessel issued a NE multispecies permit, including vessels fishing for small-mesh multispecies or whiting, Atlantic herring permit, or a Tier 3 Limited Access mackerel permit, fishing vessel log reports must be postmarked or received by midnight of the first Tuesday following the end of the reporting week. If no fishing trip is made during a reporting week for such a vessel, a report stating so must be submitted and received by NMFS by midnight of the first Tuesday following the end of the reporting week, as instructed by the Regional Administrator. For the purposes of this paragraph (f)(2)(i), the date when fish are offloaded will establish the reporting week or month that the VTR must be submitted to NMFS, as appropriate. Any fishing activity during a particular reporting week (i.e., starting a trip, landing, or offloading catch) will constitute fishing during that reporting week and will eliminate the need to submit a negative fishing report to NMFS for that reporting week. For example, if a vessel issued a NE multispecies permit, Atlantic herring permit, or Tier 3 Limited Access Mackerel Vessel begins a fishing trip on Wednesday, but returns to port and offloads its catch on the following Thursday (i.e., after a trip lasting 8 days), the VTR for the fishing trip would need to be submitted by midnight Tuesday of the third week, but a negative report (i.e., a ''did not fish'' report) would not be required for either earlier week.

* * * * *

3. In § 648.13, paragraph (e) is revised to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(e) Vessels issued a letter of authorization from the Regional Administrator to transfer small-mesh multispecies at sea for use as bait will automatically have 500 lb (226.8 kg) deducted from the vessel's combined silver hake and offshore hake possession limit, as specified under § 648.86(d), for every trip during the participation period specified on the letter of authorization, regardless of whether a transfer of small-mesh multispecies at sea occurred or whether the actual amount that was transferred was less than 500 lb (226.8 kg). This deduction shall be noted on the transferring vessel's letter of authorization from the Regional Administrator.

* * * * *

4. In § 648.80, paragraphs (a)(6)(i)(B), (a)(6)(i)(F), (a)(9)(i)(A), (a)(9)(ii), (a)(15)(i)(B), (a)(16)(i)(A), and (a)(16)(ii)(A) are revised to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(6) * * *

(i) * * *

(B) An owner or operator of a vessel fishing in this area may not fish for, possess on board, or land any species of fish other than whiting and offshore hake combined—in excess of 30,000 lb (13,608 kg), except for the following, with the restrictions noted, as allowable incidental species: Atlantic herring, up to the amount specified in § 648.204; longhorn sculpin; squid, butterfish, and Atlantic mackerel, up to the amounts specified in § 648.26; spiny dogfish, up to the amount specified in § 648.235; red hake, up to the amount specified in § 648.86(d), monkfish and monkfish parts—up to 10 percent, by weight, of all other species on board or up to 50 lb (23 kg) tail-weight/166 lb (75 kg) whole-weight of monkfish per trip, as specified in § 648.94(c)(4), whichever is less; and American lobster—up to 10 percent, by weight, of all other species on board or 200 lobsters, whichever is less, unless otherwise restricted by landing limits specified in § 697.17 of this chapter.

* * * * *

(F) A vessel fishing in the Cultivator Shoal Whiting Fishery Exemption Area may fish for small-mesh multispecies in exempted fisheries outside of the Cultivator Shoal Whiting Fishery Exemption Area, provided that the vessel complies with the more restrictive gear, possession limit, and other requirements specified in the regulations of that exempted fishery for the entire participation period specified on the vessel's letter of authorization and consistent with paragraph (a)(15)(i)(G) of this section. For example, a vessel may fish in both the Cultivator Shoal Whiting Fishery Exemption Area and the Southern New England or Mid-Atlantic Exemption Areas, and would be restricted to a minimum mesh size of 3 inches (7.6 cm) and a maximum trip limit of 30,000 lb (13,607.8 kg) for silver hake and offshore hake, combined, as required in the Cultivator Shoal Whiting Fishery Exemption Area.

* * * * *

(9) * * *

(i) * * *

(A) Unless otherwise prohibited in § 648.81, a vessel subject to the minimum mesh size restrictions specified in paragraphs (a)(3) or (4) of this section may fish with or possess nets with a mesh size smaller than the minimum size, provided the vessel complies with the requirements of paragraphs (a)(5)(ii) or (a)(9)(ii) of this section, and § 648.86(d), from July 15 through November 15, when fishing in Small Mesh Area 1; and from January 1 through June 30, when fishing in Small Mesh Area 2. While lawfully fishing in these areas with mesh smaller than the minimum size, an owner or operator of any vessel may not fish for, possess on board, or land any species of fish other than: Silver hake and offshore hake, combined, and red hake—up to the amounts specified in § 648.86(d); butterfish, Atlantic mackerel, squid, up the amounts specified in § 648.26; spiny dogfish, up to the amount specified in § 648.235; Atlantic herring, up to the amount specified in § 648.204; and scup, up to the amount specified in § 648.128.

* * * * *

(ii) *Raised footrope trawl.* Vessels fishing in the Small Mesh Areas I and II Exemption Programs described in § 648.80(a)(9) must configure the vessel's gear with a raised footrope trawl, configured in such a way that, when towed, the gear is not in contact with the ocean bottom. Vessels are presumed to be fishing in such a manner if their trawl gear is designed as specified in paragraphs (a)(9)(ii)(A) through (D) of this section and is towed so that it does not come into contact with the ocean bottom.

* * * * *

(15) * * *

(i) * * *

(B) All nets must be no smaller than a minimum mesh size of 2.5-inch (6.4-cm) square or diamond mesh, subject to the restrictions as specified in paragraph (a)(15)(i)(D) of this section. An owner or operator of a vessel enrolled in the raised footrope whiting fishery may not fish for, possess on board, or land any species of fish other than silver hake, offshore hake, and red hake, subject to the applicable possession limits as specified in § 648.86(d), except for the following allowable incidental species: Butterfish, Atlantic mackerel, and squid, up to the amounts specified in § 648.26; scup, up to the amount specified in § 648.128; spiny dogfish, up to the amount specified in § 648.235, and Atlantic herring, up to the amount specified in § 648.204.

* * * * *

(16) * * *

(i) * * *

(A) All nets must comply with a minimum mesh size of 2.5-inch (6.4-cm) square or diamond mesh, subject to the restrictions specified in paragraph (a)(16)(i)(B) of this section. An owner or operator of a vessel participating in the GOM Grate Raised Footrope Trawl Exempted Whiting Fishery may not fish for, possess on board, or land any species of fish, other than silver hake and offshore hake, subject to the applicable possession limits as specified in paragraph (a)(16)(i)(C) of this section, and red hake, subject to the possession limit specified in § 648.86, except for the following allowable incidental species: Butterfish, Atlantic mackerel, and squid, up to the amounts specified in § 648.26; Atlantic herring, up to the amount specified in § 648.204; and alewife.

* * * * *

(ii) * * *

(A) An owner or operator of a vessel fishing in the GOM Grate Raised Footrope Trawl Exempted Whiting Fishery must configure the vessel's gear with a raised footrope trawl as specified in paragraphs (a)(9)(ii)(A) through (C) of this section. In addition, the restrictions specified in paragraphs (a)(16)(ii)(B) and (C) of this section apply to vessels fishing in the GOM Grate Raised Footrope Trawl Exempted Whiting Fishery.

* * * * *

4. In § 648.86, (d)(1)(i) introductory text, (d)(1)(ii) introductory text, (d)(1)(iii) introductory text, and paragraph (d)(4)(ii) are revised to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(d) * * *

(1) * * *

(i) *Vessels possessing on board or using nets of mesh size smaller than 2.5 inches (6.4 cm).* An owner or operator of a vessel may possess and land not more than 5,000 lb (2,268 kg) of red hake, and not more than 3,500 lb (1,588 kg) of combined silver hake and offshore hake, if either of the following conditions apply:

* * * * *

(ii) *Vessels possessing on board or using nets of mesh size equal to or greater than 2.5 inches (6.4 cm) but less than 3 inches (7.6 cm).* An owner or operator of a vessel that is not subject to the possession limit specified in paragraph (d)(1)(i) of this section may possess and land not more than 5,000 lb (2,268 kg) of red hake, and not more than 7,500 lb (3,402 kg) of combined

silver hake and offshore hake if either of the following conditions apply:

* * * * *

(iii) *Vessels possessing on board or using nets of mesh size equal to or greater than 3 inches (7.6 cm).* An owner or operator of a vessel that is not subject to the possession limits specified in paragraphs (d)(1)(i) and (ii) of this section may possess and land not more than 5,000 lb (2,268 kg) of red hake, and not more than 30,000 lb (13,608 kg) of combined silver hake and offshore hake when fishing in the Gulf of Maine or Georges Bank Exemption Areas, as described in § 648.80(a), and not more than 40,000 lb (18,144 kg) of combined silver hake and offshore hake when fishing in the Southern New England or Mid-Atlantic Exemption Areas, as described in §§ 648.80(b)(10) and 648.80(c)(5), respectively, if both of the following conditions apply:

* * * * *

(4) * * *

(ii) *Silver hake and offshore hake.* If a possession limit reduction is needed for a stock area, the incidental possession limit for silver hake and offshore hake, combined, in that stock area will be 2,000 lb (907 kg) for the remainder of the fishing year.

* * * * *

5. In § 648.90, paragraphs (b)(1), (b)(2), (b)(2)(i)(C), (b)(2)(ii)(C), (b)(3), (b)(4), (b)(5)(ii), and (c)(1) are revised to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(b) * * *

(1) *Three-year specifications process, annual review, and specifications package.* The Council will specify on at least a 3-year basis the OFL, ABC, ACLs, and TALs for each small-mesh multispecies stock in accordance with the following process.

(i) At least every 3 years, based on the annual review, described below in paragraph (b)(3) of this section, and/or the specifications package, described in paragraph (b)(4) of this section, recommendations for ABC from the Scientific and Statistical Committee (SSC), and any other relevant information, the Whiting PDT shall recommend to the Whiting Oversight Committee and Council specifications including the OFL, ABC, ACL, and TAL for each small-mesh multispecies stock for a period of at least 3 years. The Whiting PDT and the Council shall follow the process in paragraph (b)(2) of this section for setting these specifications.

(ii) The Whiting PDT, after reviewing the available information on the status of the stock and the fishery, may recommend to the Council any measures necessary to assure that the specifications will not be exceeded, as well as changes to the appropriate specifications.

(iii) Taking into account the annual review and/or specifications package described in paragraphs (b)(2) and (b)(4), respectively, of this section, the advice of the SSC, and any other relevant information, the Whiting PDT may also recommend to the Whiting Oversight Committee and Council changes to stock status determination criteria and associated thresholds based on the best scientific information available, including information from peer-reviewed stock assessments of small-mesh multispecies. These adjustments may be included in the Council's specifications for the small-mesh multispecies fishery.

(iv) *Council recommendation.* (A) The Council shall review the recommendations of the Whiting PDT, Whiting Oversight Committee, and SSC, any public comment received thereon, and any other relevant information, and make a recommendation to the Regional Administrator on appropriate specifications and any measures necessary to assure that the specifications will not be exceeded.

* * * * *

(2) *Process for specifying ABCs, ACLs, and TALs.* The Whiting PDT shall calculate the OFL and ABC values for each small-mesh multispecies stock based on the control rules established in the FMP. These calculations shall be reviewed by the SSC, guided by terms of reference developed by the Council. The ACLs and TALs shall be calculated based on the SSC's approved ABCs, as specified in paragraphs (a)(2)(i)(A) through (C), and (a)(2)(ii)(A) through (C) of this section.

(i) * * *

(C) *TALs.* (*1*) The northern silver hake and southern whiting TALs are equal to the northern silver hake and southern whiting ACLs minus a discard estimate based on the most recent 3 years of data. The northern silver hake and southern whiting TALs are then reduced by 3 percent to account for silver hake and offshore hake landings that occur in state waters.

(*2*) If more than two-thirds of the southern red hake TAL is harvested in a single year, the Regional Administrator shall consult with the Council and will consider implementing quarterly TALs in the following fishing year, as proscribed in the FMP and in a manner consistent with the requirements of the Administrative Procedure Act.

(ii) * * *

(C) *TALs.* (*1*) The northern silver hake and southern whiting TALs are equal to the northern silver hake and southern whiting ACLs minus a discard estimate based on the most recent 3 years of data. The northern silver hake and southern whiting TALs are then reduced by 3 percent to account for silver hake and offshore hake landings that occur in state waters.

(*2*) If more than two-thirds of the southern whiting TAL is harvested in a single year, the Regional Administrator shall consult with the Council and will consider implementing quarterly TALs in the following fishing year, as proscribed in the FMP and in a manner consistent with the requirements of the Administrative Procedure Act.

(3) *Annual Review.* (i) Using a report provided by NMFS that includes trends in the fishery, changes in stock biomass, and total catch data, the Whiting PDT shall meet at least once annually to review the status of the stock and the fishery and the adequacy of the 3-year specifications. Based on such review, the PDT shall provide a report to the Council on any changes or new information about the small-mesh multispecies stocks and/or fishery, and it shall recommend whether the specifications for the upcoming year(s), established pursuant to paragraph (b)(1) of this section, need to be modified. At a minimum, this review must include a review of at least the following data, if available: Commercial catch data; discards; stock status (exploitation rate and survey biomass); sea sampling, port sampling, and survey data or, if sea sampling data are unavailable, length frequency information from port sampling and/or surveys; impact of other fisheries on the mortality of small-mesh multispecies; and any other relevant information.

(ii) If new and/or additional information becomes available, the Whiting PDT shall consider it during this annual review. Based on this review, the Whiting PDT shall provide guidance to the Whiting Oversight Committee and the Council regarding the need to adjust measures for the small-mesh multispecies fishery to better achieve the FMP's objectives. After considering this guidance, the Council may submit to NMFS its recommendations for changes to management measures, as appropriate, through the specifications process described in this section, the process specified in paragraph (c) of this

section, or through an amendment to the FMP.

(4) *Specifications package.* (i) The Whiting PDT shall prepare a specification package, including a SAFE Report, at least every 3 years. Based on the specification package, the Whiting PDT shall develop and present to the Council recommended specifications as defined in paragraph (a) of this section for up to 3 fishing years. The specifications package shall be the primary vehicle for the presentation of all updated biological and socio-economic information regarding the small-mesh multispecies fishery. The specifications package shall provide source data for any adjustments to the management measures that may be needed to continue to meet the goals and objectives of the FMP.

(ii) In any year in which a specifications package, including a SAFE Report, is not completed by the Whiting PDT, the annual review process described in paragraph (a) of this section shall be used to recommend any necessary adjustments to specifications and/or management measures in the FMP.

(5) *Accountability measures for the small-mesh multispecies fishery.*

(i) * * *

(ii) *Post-season adjustment for an overage.* If NMFS determines that a small-mesh multispecies ACL was exceeded in a given fishing year, the in-season accountability measure adjustment trigger, as specified in § 648.90(b)(5)(i) shall be reduced in a subsequent fishing year by 1 percent for each 1 percent by which the ACL was exceeded through notification consistent with the Administrative Procedure Act. For example, if the in-season adjustment trigger is 90 percent, and an ACL is exceeded by 5 percent, the adjustment trigger for the stock whose ACL was exceeded would be reduced to 85 percent for subsequent fishing years.

* * * * *

(c) * * *

(1) *Adjustment process.* (i) After a management action has been initiated, the Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures, other than to address gear conflicts, must come from one or more of the following categories: DAS changes, effort monitoring, data reporting, possession limits, gear restrictions, closed areas, permitting restrictions, crew limits, minimum fish sizes, onboard observers, minimum hook size and hook style, the use of crucifer in the hook-gear fishery, sector requirements, recreational fishing measures, area closures and other appropriate measures to mitigate marine mammal entanglements and interactions, description and identification of EFH, fishing gear management measures to protect EFH, designation of habitat areas of particular concern within EFH, and any other management measures currently included in the FMP.

(ii) The Council's recommendation on adjustments or additions to management measures pertaining to small-mesh NE multispecies, other than to address gear conflicts, must come from one or more of the following categories: Quotas and appropriate seasonal adjustments for vessels fishing in experimental or exempted fisheries that use small mesh in combination with a separator trawl/grate (if applicable); modifications to separator grate (if applicable) and mesh configurations for fishing for small-mesh NE multispecies; adjustments to whiting stock boundaries for management purposes; adjustments for fisheries exempted from minimum mesh requirements to fish for small-mesh NE multispecies (if applicable); season adjustments; declarations; participation requirements for any of the Gulf of Maine/Georges Bank small-mesh multispecies exemption areas; OFL and ABC values; ACL, TAL or TAL allocations, including the proportions used to allocate by season or area; small-mesh multispecies possession limits, including in-season AM possession limits; changes to reporting requirements and methods to monitor the fishery; and biological reference points, including selected reference time series, survey strata used to calculate biomass, and the selected survey for status determination.

(iii) *Adjustment process for whiting DAS.* The Council may develop recommendations for a whiting DAS effort reduction program through the framework process outlined in paragraph (c) of this section only if these options are accompanied by a full set of public hearings that span the area affected by the proposed measures in order to provide adequate opportunity for public comment.

* * * * *

[FR Doc. 2012–26793 Filed 11–1–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 213
Friday, November 2, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: International Billfish Angler Survey.

OMB Control Number: 0648–0020.

Form Number(s): NOAA 88–10.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 1,000.

Average Hours Per Response: 5 minutes.

Burden Hours: 83.

Needs and Uses: This request is for extension of a current information collection.

The International Billfish Angler Survey began in 1969 and is an integral part of the Billfish Research Program at the National Oceanic and Atmospheric Administration's (NOAA) Southwest Fisheries Science Center (SWFSC). The survey tracks recreational angler fishing catch and effort for billfish in the Pacific and Indian Oceans in support of the Pacific and Western Pacific Fishery Management Councils, authorized under the Magnuson-Stevens Fishery Management and Conservation Act (MSA). The data may be used by scientists and fishery managers to assist with assessing the status of billfish stocks. The survey is intended for anglers cooperating in the Billfish Program and is entirely voluntary. This survey is specific to recreational anglers fishing for Istiophorid and Xiphiid billfish in the Pacific and Indian Oceans; as such it provides the only estimates of catch per unit of effort for recreational billfish fishing in those areas.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: October 29, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–26884 Filed 11–1–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Reporting Requirements for Commercial Fisheries Authorization under Section 118 of the Marine Mammal Protection Act.

OMB Control Number: 0648–0292.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 200.

Average Hours Per Response: 15 minutes.

Burden Hours: 50.

Needs and Uses: This request is for an extension of a currently approved information collection.

Reporting injury to and/or mortalities of marine mammals is mandated under Section 118 of the Marine Mammal Protection Act. This information is required to determine the impacts of commercial fishing on marine mammal populations. This information is also used to categorize commercial fisheries into Categories I, II, or III. Participants in the first two categories must be authorized to take marine mammals, while those in Category III are exempt from that requirement. All categories must report injuries or mortalities on a National Marine Fisheries Service form.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: October 29, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–26885 Filed 11–1–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting; Rescheduled

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on November 8, 2012, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors

and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.

2. Remarks from the Bureau of Industry and Security Management.

3. Industry Presentations.

4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than October 23, 2012.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on September 27, 2011 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 10(d), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Dated: October 29, 2012.

Teresa Telesco,

Assistant Committee Liaison Officer.

[FR Doc. 2012–26871 Filed 11–1–12; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Manufacturing Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of extension of the application period for membership on the manufacturing council.

SUMMARY: On September 14, 2012, the Department of Commerce's International Trade Administration published a notice in the **Federal Register** (77 FR 56811) soliciting applications for appointment of 25 members of the Manufacturing Council (Council) for a two-year term to begin in fall 2012. The September 14, 2012 notice provided that all applications must be received by the Office of Advisory Committees of the Department of Commerce by close of business on November 2, 2012. This notice extends the application period in order to provide the public with an additional opportunity to submit applications. The eligibility and evaluation criteria contained in the September 14, 2012 notice shall continue to apply. The purpose of the Council is to advise the Secretary of Commerce on matters relating to the competitiveness of the U.S. manufacturing sector and to provide a forum for regular communication between Government and the manufacturing sector.

DATES: All applications must be received by the Office of Advisory Committees by close of business on Friday, November 16, 2012.

ADDRESSES: Please submit application information to Jennifer Pilat, Office of Advisory Committees, Manufacturing Council Executive Secretariat, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, Manufacturing Council Executive Secretariat, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: 202–482–4501, email: *jennifer.pilat@trade.gov.*

Please visit the Manufacturing Council Web site at: *http://www.manufacturing.gov/council/index.asp?dName=council*

SUPPLEMENTARY INFORMATION: The Office of Advisory Committees is extending the application deadline for the appointment of 25 members of the Council for a two-year term to begin fall 2012. The Council was rechartered most recently on April 5, 2012. The criteria and procedures for selecting the members contained in the September 14, 2012 notice continue to apply and are republished herein for convenience.

Members will be selected in accordance with applicable Department of Commerce guidelines based on his or her ability to advise the Secretary of Commerce on matters relating to the U.S. manufacturing sector, to act as a liaison among the stakeholders represented by the membership, and to provide a forum for those stakeholders on current and emerging issues in the manufacturing sector. In assessing this ability, the Department will consider such factors as, but not limited to, the candidate's proven experience in promoting, developing and marketing programs in support of manufacturing industries, job creation in the manufacturing sector, or the candidate's proven abilities to manage manufacturing organizations. Given the duties and objectives of the Council, the Department particularly seeks applicants who are active manufacturing executives (Chief Executive Officer, President, or a comparable level of responsibility) that are leaders within their local manufacturing communities and industry sectors. The Council's membership shall reflect the diversity of American manufacturing by representing a balanced cross-section of the U.S. manufacturing industry in terms of industry sectors, geographic locations, demographics, and company size, particularly seeking the representation of small- and medium-sized enterprises.

During the 2012–2014 charter term of the Manufacturing Council, the Assistant Secretary of Commerce for Manufacturing and Services intends to establish a new Economic Security Commission Subcommittee. The purpose of this subcommittee will be to examine factors that impact the long-term strategic challenges faced by the manufacturing sector in the United States. As indicated below, applicants are encouraged to highlight in their submissions any interest in and experience relevant to the work of this subcommittee.

The Secretary of Commerce appoints all Council members. All Council members serve at the discretion of the Secretary of Commerce. Council members shall serve in a representative capacity, representing the views and interests of a U.S. entity in the manufacturing industry and its particular sector. For the purposes of eligibility, a U.S. entity is defined as a firm incorporated in the United States (or an unincorporated firm with its

principal place of business in the United States) that is controlled by U.S. citizens or by another U.S. entity. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities.

As noted above, Council members serve in a representative capacity, expressing the views and interests of a U.S. entity; they are, therefore, not Special Government Employees. Council members receive no compensation for their participation in Council activities. Members participating in Council meetings and events are responsible for their travel, living and other personal expenses. Meetings are held regularly and not less than annually, usually in Washington, DC Members are required to attend a majority of the Council's meetings.

To be considered for membership, please provide the following:

1. Name and title of the individual requesting consideration.

2. A sponsor letter from the applicant on his or her entity's letterhead or, if the applicant is to represent an entity other than his or her employer, a letter from the entity to be represented, containing a brief statement of why the applicant should be considered for membership on the Council. This sponsor letter should also address the applicant's manufacturing-related experience, including any manufacturing trade policy experience.

3. The applicant's personal resume.

4. An affirmative statement that the applicant meets all eligibility criteria.

5. An affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.

6. An affirmative statement that the applicant is not a federally registered lobbyist, and that the applicant understands that, if appointed, the applicant will not be allowed to continue to serve as a Council member if the applicant becomes a federally registered lobbyist.

7. Information regarding the control of the entity to be represented, including the governing structure and stock holdings, as appropriate, demonstrating compliance with the criteria set forth above.

8. The entity's size, place of incorporation or principal place of business, ownership, product or service line and major markets in which the entity operates.

9. Please include all relevant contact information such as mailing address, fax, email, phone number, and support staff information where relevant.

10. Please indicate if the applicant has an interest in serving on the Economic Security Commission subcommittee, if appointed, and highlight any experience relevant to the work of the subcommittee.

Dated: October 26, 2012.

Jennifer Pilat,

Executive Secretary, Manufacturing Council.

[FR Doc. 2012–26847 Filed 11–1–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Vacancies on the U.S. Section of the U.S.-Iraq Business Dialogue

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice.

SUMMARY: The U.S. Secretary of Commerce and the Iraq Minister of Trade in July 2006 established the U.S.-Iraq Business Dialogue (Business Dialogue or Dialogue) as a bilateral forum to facilitate private sector business growth in Iraq and to strengthen trade and investment ties between the United States and Iraq. This notice announces four open membership opportunities for representatives of American industry to join the U.S. section of the Dialogue following the end of term for existing members.

DATES: Applications must be received no later than November 15, 2012; 5:00 p.m. EST.

ADDRESSES: Please send requests for consideration to Ms. Susan Hamrock Mann, Director, Iraq Investment and Reconstruction Task Force, U.S. Department of Commerce, either by fax on 202–482–0980 or by mail to U.S. Department of Commerce, 14th and Constitution Avenue NW., Mail Stop 3421, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Kevin M. Reichelt, Office of the Middle East, U.S. Department of Commerce, Room 2029–B, Washington, DC 20230. Phone: 202–482–2896.

SUPPLEMENTARY INFORMATION: The U.S. Secretary of Commerce and the Iraqi Minister of Trade co-chair the Dialogue. The Dialogue consists of a U.S. Section and an Iraqi Section. Each Section consists of members from the private sector, representing the views and interests of the private sector business community. Each Party appoints the members to its respective Section. The Sections provide policy advice and counsel to the U.S. Secretary of Commerce and to Iraq's Minister of Trade that reflect private sector views, needs, and concerns regarding private sector business development in Iraq and enhanced bilateral commercial ties that would form the basis for expanded trade between the United States and Iraq. The Dialogue will exchange information and encourage bilateral discussions that address the following areas:

—Factors that affect the growth of private sector business in Iraq, including disincentives to trade and investment and regulatory obstacles to job creation and investment growth;
—Initiatives that the Government of Iraq might take, such as enacting, amending, enforcing, or repealing laws and regulations, to promote private sector business growth in Iraq;
—Promotion of business opportunities in both Iraq and the United States, and identification of opportunities for U.S. and Iraqi firms to work together; and
—Attracting U.S. businesses to opportunities in Iraq and serving as a catalyst for Iraqi private sector growth.

Applications to represent any sector will be considered. The U.S. section will represent a cross-section of American businesses.

Members serve in a representative capacity representing the views and interests of their particular industries. Members are not special government employees, and receive no compensation for their participation in Dialogue activities. Only appointed members may participate in Dialogue meetings; substitutes and alternates will not be permitted. Section members serve for three-year terms, but may be reappointed. U.S. Section members serve at the discretion of the Secretary of Commerce.

Candidates will be evaluated based on: Their interest in the Iraqi market; export/investment experience; contribution to diversity based on size of company, geographic location, and sector; and ability to initiate and be responsible for activities in which the Business Dialogue will be active.

In order to be eligible for membership in the U.S. section, potential candidates shall be:

—A U.S. citizen residing in the United States or able to travel to the United States or other location to attend official Business Dialogue meetings;
—The President or CEO (or comparable level of responsibility) of a private

sector company, or, in the case of large companies, a person having substantial responsibility for the company's commercial activities in Iraq, either of which shall possess unique experience with or specialized knowledge about the commercial environment in Iraq; or the head of a non-profit entity, such as a trade or industry association, who possesses unique technical expertise, and the ability to provide counsel with respect to private sector business development in Iraq; and

—Not a registered foreign agent under the Foreign Agents Registration Act of 1938, as amended.

Members will be selected on the basis of who best will carry out the objectives of the Business Dialogue as described above and as stated in the Terms of Reference for the Dialogue. (The Terms of Reference are available from the point of contact listed above.) Recommendations for appointment will be made to the Secretary of Commerce. All candidates will be notified of whether they have been selected.

To be considered for membership, please submit the following information as instructed in the addresses and dates captions above: Name(s) and title(s) of the individual(s) requesting consideration; name and address of company or non-profit entity to be represented; size of the company or non-profit entity; description of relevant product, service, or technical expertise; size of company's export trade, investment, and/or international program experience; nature of operations or interest in Iraq; responsibilities of the candidate within the company or non-profit entity; and a brief statement of why the candidate should be appointed, including information about the candidate's ability to initiate and be responsible for activities in which the Business Dialogue will be active.

Susan Hamrock Mann,

Director, Iraq Investment and Reconstruction Task Force.

[FR Doc. 2012–26437 Filed 11–1–12; 8:45 am]

BILLING CODE P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete products from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received on or Before: 12/3/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

For Further Information or to Submit Comments Contact: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following products are proposed for deletion from the Procurement List:

Products:

NSN: 7520–01–584–1378—Pen & Calculator Case, Rosewood
NPA: Tarrant County Association for the Blind, Fort Worth, TX
Contracting Activity: General Services Administration, New York, NY

NSN: 8115–00–NIB–0001—Container, Mailing Cassette
NSN: 8115–00–NIB–0003—Cassette, Mailing Container
NPA: L.C. Industries for the Blind, Inc., Durham, NC
Contracting Activity: Library of Congress, Fedlink Contracts, Washington, DC

NSN: 6545–00–911–1300—Blanket Set, Bed
NSN: 6545–01–168–6893—First Aid Kit, Small Craft
NSN: 6545–00–920–7125—First Aid Kit, Gun Crew
NSN: 6545–01–141–9476—Medical Equipment Set, Ground Ambulance
NSN: 6545–01–191–8972—Medical Equipment Set, Trauma, Field
NSN: 6545–01–191–8971—Medical Equipment Set, X-Ray, Field
NSN: 6545–01–191–8970—Medical Equipment Set, Laboratory, Field
NPA: Ontario County Chapter, NYSARC, Inc., Canandaigua, NY
Contracting Activity: Defense Logistics Agency Troop Support, Philadelphia, PA

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2012–26886 Filed 11–1–12; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 12/3/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 8/31/2012 (77 FR 53179–53180) and 9/14/2012 (77 FR 56813–56814), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in

connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products:

NSN: 1095–01–446–4348—Knife, Combat, Drop Point, Automatic, with Sheath
NSN: 1095–01–456–4457—Knife, Combat, Tanto Point, Automatic
NPA: DePaul Industries, Portland, OR
Contracting Activity: Defense Logistics Agency Land and Maritime, Columbus, OH
Coverage: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Land and Maritime, Columbus, OH.

Services:

Service Type/Location: Custodial Services, US Border Patrol Checkpoint 808, I–8 Westbound 70.8 Mile Marker, Winterhaven, CA.
NPA: ARC-Imperial Valley, El Centro, CA
Contracting Activity: Dept of Homeland Security, U.S. Customs and Border Protection, Border Enforcement Contracting Division, Washington, DC
Service Type/Location: Hospital Housekeeping, Raymond W. Bliss Army Health Center, 2240 E Winrow Avenue, Ft Huachuca, AZ.
NPA: Enterprise Professional Services, Inc., Austin, TX
Contracting Activity: Dept of the Army, W40M USA MedCom HCAA, Fort Sam Houston, TX

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2012–26887 Filed 11–1–12; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE Over-the-Counter Drug Demonstration Project

AGENCY: Office of the Secretary, DoD.

ACTION: Notice of an extension to the TRICARE Over-the-Counter Drug Demonstration Project.

SUMMARY: This notice is to advise interested parties of a 2-year extension of the demonstration project in which the Department of Defense (DoD) evaluates allowing selected over-the-counter (OTC) drugs to be included on the TRICARE uniform formulary. The Department will continue to evaluate the costs/benefits and beneficiary satisfaction of providing OTC drugs under the pharmacy benefits program when the selected OTC drugs are determined to be clinically effective.

DATES: This demonstration project will continue through November 4, 2014.

FOR FURTHER INFORMATION CONTACT: Colonel George Jones, TRICARE Management Activity, Pharmaceutical Operations Directorate, telephone (703) 681–2890.

SUPPLEMENTARY INFORMATION: Section 705 of the John Warner National Defense Authorization Act for 2007 directed the Secretary to conduct a demonstration project under 10 U.S.C. 1092 to allow certain over-the-counter (OTC) medications to be included on the uniform formulary under 10 U.S.C. 1074g. On June 15, 2007, the Department of Defense published a notice in the **Federal Register** (72 FR 33208–33210) implementing the demonstration project until the implementation of the combined TRICARE mail and retail contract (TPharm) which was on November 4, 2009. In order to more thoroughly evaluate the clinical and cost effectiveness of OTC drugs as well as beneficiary satisfaction with the project, the Department published a notice in the **Federal Register** (74 FR 66626–66627) on December 16, 2009 that extended the demonstration project through November 4, 2012. The Department has determined that continuation of the demonstration project for an additional 2 years is necessary to provide the Secretary with sufficient information to fully evaluate the project. The demonstration project continues to be authorized by 10 U.S.C. 1092.

Dated: October 31, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–26888 Filed 11–1–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Race to the Top—District

AGENCY: Office of the Deputy Secretary, Department of Education.

ACTION: Notice reopening the Race to the Top—District competition.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.416.

SUMMARY: The Secretary reopens the Race to the Top—District competition to extend the deadline for submitting applications. Hurricane Sandy prevented many applicants from submitting their applications by the October 30, 2012, deadline. The hurricane also closed Federal Government offices in Washington, DC, on October 29 and 30, 2012. The Department, therefore, could not receive applications on those days.

For local educational agencies located in States affected by Hurricane Sandy and for which the President has issued a major disaster declaration or an emergency declaration, the new deadline is 4:30 p.m. Washington, DC time on Wednesday, November 7, 2012. For local educational agencies everywhere else, the new deadline is 4:30 p.m. Washington, DC time on Friday, November 2, 2012.

DATES: *Deadline for Transmittal of Applications:*

For local educational agencies located in States affected by Hurricane Sandy and for which the President has issued either a major disaster declaration or an emergency declaration: November 7, 2012. For local educational agencies located everywhere else: November 2, 2012.

FOR FURTHER INFORMATION CONTACT: Meredith Farace, U.S. Department of Education, 400 Maryland Avenue SW., room 7e208, Washington, DC 20202–4260. Telephone: (202) 453–6800. Fax: (202) 401–1557.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On August 16, 2012, we published in the **Federal Register** (77 FR 49654) a notice inviting applications for the Race to the Top—District competition. That notice established an October 30, 2012, deadline for submitting applications. We are extending that deadline because Hurricane Sandy prevented many applicants from submitting their applications by that deadline. The hurricane also closed Federal Government offices in Washington, DC, on October 29 and 30, 2012. The Department, therefore, could not receive applications on those days. For local educational agencies located in States affected by Hurricane Sandy and for which the President has issued a major disaster declaration or an emergency declaration, the new deadline is 4:30 p.m. Washington, DC time on Wednesday, November 7, 2012. For local educational agencies located everywhere else, the new deadline is

4:30 p.m. Washington, DC time on Friday, November 2, 2012.

An eligible applicant that submitted an application by the October 30, 2012, deadline does not need to re-submit its application but may choose to do so. If you re-submit your application, we will consider the most recently submitted complete application.

All information in the August 16, 2012, notice for this competition remains the same, except for the change in the deadline for submitting applications. Information about the Race to the Top—District program is available on the Department's Web site at *http://www2.ed.gov/programs/racetothetop-district/index.html.*

Note: Applications for grants under this competition must be submitted in electronic format on a CD or DVD, with CD–ROM or DVD–ROM preferred, by mail or hand delivery. For complete information about how to submit an application, please refer to the *Application and Submission Information* section in the August 16, 2012, notice, available at *http://www2.ed.gov/programs/racetothetop-district/index.html.*

Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program person listed in this section.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. *Program Authority:* Sections 14005 and 14006 of the ARRA (Pub. L. 111–5), as amended by section 1832(b) of Division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10), and the Department of Education Appropriations Act, 2012 (Title III of Division F of Pub. L. 112–74, the Consolidated Appropriations Act, 2012).

Dated: October 31, 2012.

Arne Duncan,

Secretary of Education.

[FR Doc. 2012–26915 Filed 10–31–12; 4:15 pm]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9005–8]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 10/22/2012 Through 10/26/2012

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

SUPPLEMENTARY INFORMATION: As of October 1, 2012, EPA will not accept paper copies or CDs of EISs for filing purposes; all submissions on or after October 1, 2012 must be made through e-NEPA.

While this system eliminates the need to submit paper or CD copies to EPA to meet filing requirements, electronic submission does not change requirements for distribution of EISs for public review and comment. To begin using e-NEPA, you must first register with EPA's electronic reporting site—*https://cdx.epa.gov/epa_home.asp.*

EIS No. 20120344, Final EIS, BLM, AZ, Restoration Design Energy Project, Proposed Resource Management Plan Amendments, Identifying Lands Across Arizona Suitable for Renewable Energy Development, AZ, Review Period Ends: 12/03/2012, Contact: Kathryn Pedrick 602–417–9235.

EIS No. 20120345, Revised Draft EIS, USFS, ID, Lower Orogrande Project, Analysis of Three Alternatives, North Fork Ranger District, Clearwater National Forest, Clearwater County, ID, Comment Period Ends: 12/17/2012, Contact: Kathy Rodriguez 208–476–4541.

EIS No. 20120346, Final EIS, USFS, CA, Two Bit Vegetation Management Project, Happy Camp Ranger District, Klamath National Forest, Siskiyou County, CA, Review Period Ends: 12/17/2012, Contact: Wendy Coats 530–841–4470

EIS No. 20120347, Draft EIS, USFS, OR, Summit Logan Valley Grazing Authorization Project, Prairie City Ranger District, Malheur National Forest, Grant County, OR, Comment Period Ends: 12/17/2012, Contact: Randy Gould 541–820–3800.

EIS No. 20120348, Draft EIS, USFS, AZ, Show Low South Land Exchange, Apache-Sitgreaves National Forests, Coconino National Forest, and Prescott National Forest, Yavapai, Navajo, Greenlee, and Apache Counties, AZ, Comment Period Ends: 12/17/2012, Contact: Stephen James 928–333–6266.

EIS No. 20120349, Draft EIS, FHWA, VA, Interstate 64 Peninsula, from Interstate 95 in the City of Richmond to Interstate 664 in the City of Hampton, VA, Comment Period Ends: 01/07/2013, Contact: John Simkins 804–371–6831.

EIS No. 20120350, Final EIS, BLM, CA, Desert Harvest Solar Project, Construction, Operation, Maintenance, and Decommissioning of an 150-megawatt Photovoltaic Solar Energy Facility and Generation-Intertie Transmission Line, Consideration of Issuance of a Right-of-Way Grant, Riverside County, CA, Review Period Ends: 12/03/2012, Contact: Frank McMenimen 760–833–7150.

EIS No. 20120351, Final EIS, VCT, NM, Valles Caldera National Preserve Public Access and Use Plan, Sandoval and Rio Arriba Counties, NM, Review Period Ends: 12/05/2012, Contact: Marie Rodriguez 505–428–7728.

Dated: October 29, 2012.

Dawn R. Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2012–26876 Filed 11–1–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

Federal Register Citation of Previous Announcement—77 FR 65687 (October 30, 2012).

DATE & TIME: Thursday, November 1, 2012 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This Meeting Will Be Open To The Public.

Changes In The Meeting—This meeting has been cancelled.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2012–26942 Filed 10–31–12; 4:15 pm]

BILLING CODE 6715–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5601–N–43]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *COE:* Mr. Scott Whiteford, Army Corps of Engineers, Real Estate, CEMP–CR, 441 G Street NW., Washington, DC 20314; (202) 761–5542; *GSA:* Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040, Washington, DC 20405, (202) 501–0084. (These are not toll-free numbers.)

Dated: October 25, 2012.

Ann Marie Oliva,

Deputy Assistant Secretary for Special Needs (Acting).

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 11/02/2012

Suitable/Available Properties

Building

Connecticut

Garage
Colebrook River Lake
Riverton CT 06065
Landholding Agency: COE
Property Number: 31201240005
Status: Underutilized
Comments: off-site removal only; 635 sf.; storage; major renovations needed.

Kansas

Sun Dance Park
31051 Melvern Lake Pkwy
Melvern KS 66510
Landholding Agency: COE
Property Number: 31201220011
Status: Underutilized
Comments: 133 sf.; bathroom; poor to fair conditions; significant deterioration on interior wood frame in several places.

Kentucky

Rough River Lake Project
Various Campgrounds
Falls Rough KY
Landholding Agency: COE
Property Number: 31201220003
Status: Excess
Comments: off-site removal only; 96 sf. for ea. trash bin.

Missouri

W. Hwy Vault Toilet
US Army COE
Smithville MO 64089
Landholding Agency: COE
Property Number: 31201220004
Status: Underutilized
Comments: Available for off-site removal; 100 sf.; current use: toilet; need extensive repairs.

St. Louis District

Wappapello Lake Project Office
Wappapello MO 63966
Landholding Agency: COE
Property Number: 31201220014
Status: Unutilized
Comments: 376.69 sf.; comfort station; significant structural issues; need repairs.

New Mexico

Abiquiu Lake Project Office
USACE
Abiquiu NM
Landholding Agency: COE
Property Number: 31201240004
Status: Unutilized
Comments: off-site removal only; 165 sf.; vault-type comfort station; repairs needed.

North Carolina

Well House
Property ID # BEJ–17942
B.E. Jordon Dam & Lake NC
Landholding Agency: COE
Property Number: 31201240002
Status: Unutilized
Comments: vacant; poor conditions; need repairs.

Oklahoma

Robert S. Kerr Lake
HC 61 Box 238
Sallisaw OK 74955
Landholding Agency: COE
Property Number: 31201220005
Status: Unutilized
Comments: off-site removal only; 704 sf.; current use: bathroom; needs repairs.

Dam Site North/Ranger Creek
8568 State Hwy 251A
Ft. Gibson OK 74434
Landholding Agency: COE
Property Number: 31201220016
Status: Unutilized
Comments: off-site removal only; 36 sf.; pump house; fair conditions; access road is gated; unlocked by Ft. Gibson Lake personnel during regular business hrs.

5 Buildings
RS Kerr Lake
Sallisaw OK 74955
Landholding Agency: COE
Property Number: 31201230002
Status: Underutilized
Directions: 42863, 42857, 42858, 42859, 42860
Comments: off-site removal only; 264 sf.; use: vault toilet; excessive vegetation; severe damage from vandals.

Oologah Lake
Spencer Creek
Oologah OK 74053
Landholding Agency: COE
Property Number: 31201240003
Status: Underutilized
Comments: off-site removal only; 576 sf.; picnic shelter; repairs needed.

South Dakota

Big Bend Project
33573 N. Shore Rd.
Chamberlin SD 57325
Landholding Agency: COE
Property Number: 31201240001
Status: Unutilized
Comments: off-site removal only; 221 sf. (w/porch), office; poor conditions; severe mold.

Texas

Restroom
2000 FM 2271
Belton TX 76513
Landholding Agency: COE
Property Number: 31201240006
Status: Unutilized
Comments: off-site removal only; 850 sf.; 12 mons. vacant; poor conditions.

Veterans Post Office
1300 Matamoros St.
Laredo TX 78040
Landholding Agency: GSA
Property Number: 54201240001
Status: Excess
GSA Number: 7–G–TX–1055–AA
Comments: Correction: Approximately 57,380 sf.; sits on 1.2 acres; office; 105 yrs-old; historic preservation restrictions on bldg. & ground.

Washington

Residence, Central Ferry Park
1001 Little Goose Dam Rd.
Dayton WA 99328
Landholding Agency: COE
Property Number: 31201220008
Status: Unutilized
Comments: off-site removal only; 1,500 sf.; residence; good conditions; an access easement is required through a real estate instrument.

Restroom, Central Ferry Park
1001 Little Goose Dam Rd.
Dayton WA 99328
Landholding Agency: COE
Property Number: 31201220009
Status: Unutilized
Comments: off-site removal only; 2,457 sf.; restroom; good conditions; an access easement is required through a real estate instrument.

Restroom, Central Ferry Park
1001 Little Goose Dam Rd.
Dayton WA 99328
Landholding Agency: COE
Property Number: 31201220010
Status: Unutilized
Directions: Boat Ramp Area
Comments: off-site removal only; 420 sf.; restroom; good conditions; an access easement is required through a real estate instrument.

Restroom, Central Ferry Park
1001 Little Goose Dam Rd.
Dayton WA 99328
Landholding Agency: COE
Property Number: 31201220012
Status: Unutilized
Comments: off-site removal only; 660 sf.; restroom; an access easement is required through a real estate instrument.

Restroom, Illia Dunes
1001 Little Goose Dam Rd.
Dayton WA 99328
Landholding Agency: COE
Property Number: 31201220013
Status: Unutilized
Comments: off-site removal only; 220 sf.; restroom.

Land

Oklahoma

Keystone Lake
USACE Tract No. 2424
Keystone OK
Landholding Agency: COE
Property Number: 31201220007
Status: Excess
Comments: .013 acres; current use: civil works land; contact COE for further conditions.

Fort Gibson Lake-Tract 1251A
Lake Ft. Gibson
Wagoner OK
Landholding Agency: COE
Property Number: 31201220015
Status: Unutilized
Comments: landlocked; no established rights or means of entry; crossing onto privately-owned property is prohibited by owners.
Reasons: Not accessible by road.

[FR Doc. 2012–26783 Filed 11–1–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2012–0086]

Environmental Assessment for Potential Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf (OCS) Offshore Massachusetts

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of the availability of an environmental assessment.

SUMMARY: Bureau of Ocean Energy Management (BOEM) has prepared an environmental assessment (EA) considering the reasonably foreseeable environmental impacts and socioeconomic effects of issuing

renewable energy leases and subsequent site characterization activities (geophysical, geotechnical, archaeological, and biological surveys needed to develop specific project proposals, which will be subject to subsequent environmental review, on those leases) in an identified Wind Energy Area (WEA) on the OCS offshore Massachusetts (MA). This EA also considers the reasonably foreseeable environmental impacts associated with the approval of site assessment activities (including the installation and operation of meteorological towers and buoys) on the leases that may be issued. This EA does not consider issues related to possible later project development. The purpose of this notice is to inform the public of the availability of the EA for review and to solicit public comments on the EA.

BOEM will conduct public information meetings on Tuesday, November 13, 2012, in Boston and New Bedford, Wednesday, November 14, 2012, in Vineyard Haven on Martha's Vineyard, and Thursday, November 15, 2012, on Nantucket, in Massachusetts to explain the proposed activities and provide additional opportunities for public input on the EA. Details on the meeting locations and times, as well as the EA, can be found online at *http://www.boem.gov/Renewable-Energy-Program/Smart-from-the-Start/Index.aspx.*

FOR FURTHER INFORMATION CONTACT: Michelle Morin, BOEM Office of Renewable Energy, 381 Elden Street, HM 1328, Herndon, Virginia 20170–4817, (703) 787–1340 or *michelle.morin@boem.gov.*

SUPPLEMENTARY INFORMATION: On February 6, 2012, BOEM published a Notice of Intent (NOI) to prepare an EA, which requested public comments on important environmental issues and alternatives to be considered in the EA; measures (e.g., limitations on activities based on technology, distance from shore, or timing) that would minimize impacts to environmental resources; and socioeconomic conditions that could result from leasing, site characterization, and site assessment in and around the Call Area (77 FR 5830). The Call Area is located offshore Massachusetts. Issues and impacts associated with potential project development will be considered in subsequent environmental analyses after the submittal of project proposals, if any. Comments received in response to the NOI can be viewed at: *http://www.regulations.gov* by searching for Docket ID BOEM–2011–0116.

On May 30, 2012, BOEM announced the identification of the MA WEA, which excluded high value sea duck habitat and some fishing grounds in the Call Area. The proposed action considered by this EA, under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4370f), is leasing and approval of site assessment plans for the entire WEA. BOEM also identified alternatives to the proposed action that would exclude certain portions of the WEA from leasing because of environmental and cultural concerns. Additional information on the MA area identification process can be found at: *http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx.*

BOEM is seeking public input on the EA, including comments on the completeness and adequacy of the environmental analysis and on the measures and operating conditions described in the EA and designed to reduce or eliminate potential environmental impacts. BOEM will consider public comments on the EA in determining whether to issue a Finding of No Significant Impact (FONSI), or conduct additional analysis under NEPA.

Comments

Federal, state, and local government agencies, tribal governments, and other interested parties are requested to submit their written comments on the EA in one of the following ways:

1. Electronically: *http://www.regulations.gov.* In the entry entitled ''Enter Keyword or ID,'' enter BOEM–2012–0086, then click ''search.'' Follow the instructions to submit public comments and view supporting and related materials available for this document.

2. In written form, delivered by hand or by mail, enclosed in an envelope labeled ''Comments on Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic OCS Offshore MA'' to: Program Manager, Office of Renewable Energy, Bureau of Ocean Energy Management, 381 Elden Street, HM 1328, Herndon, Virginia 20170–4817.

Comments must be received or postmarked no later than December 3, 2012. All written comments received or postmarked during the comment period will be made available to the public.

Authority: This Notice of the Availability (NOA) of an EA is published pursuant to 43 CFR 46.305.

Dated: October 24, 2012.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2012–26905 Filed 11–1–12; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

164th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 164th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on November 26–27, 2012. This meeting originally was scheduled for October 30–31, but has been re-scheduled due to the threat of severe weather.

The meeting will take place in C5521 Room 4, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 on November 26, from 1 p.m. to approximately 5:00 p.m. On November 27, the meeting will start at 8:30 a.m. and conclude at approximately 4:00 p.m., with a break for lunch. The morning session on November 27 will be in Suite 400 at 122 C Street NW. The afternoon session on November 27 will take place in Room S–2508 at the same address. The purpose of the open meeting on November 26 and the morning of November 27 is for the Advisory Council members to finalize the recommendations they will present to the Secretary. At the November 27 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations.

The Council recommendations will be on the following issues: (1) Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans; (2) Examining Income Replacement During Retirement Years in a Defined Contribution Plan System; and (3) Managing Disability Risks in an Environment of Individual Responsibility. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site at *http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before November 19, 2012 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in text or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of an email. Statements deemed relevant by the Advisory Council and received on or before November 19 will be included in the record of the meeting and made available in the EBSA Public Disclosure Room. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by November 19, 2012 at the address indicated.

Signed at Washington, DC this 26th day of October, 2012.

Michael L. Davis,

Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2012–26875 Filed 11–1–12; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On August 6, 2012, the National Science Foundation published a notice in the **Federal Register** of a permit application received. A Waste Management Permit was issued on October 26, 2012 to:

Quark Expeditions, Permit No. 2013 WM–002

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2012–26844 Filed 11–1–12; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Rollover Election (RI 38–117), Rollover Information (RI 38–118), and Special Tax Notice Regarding Rollovers (RI 37–22)

AGENCY: Office of Personnel Management.

ACTION: 30-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension, without change, of a currently approved information collection request (ICR) 3206–0212, Rollover Election (RI 38–117), Rollover Information (RI 38–118), and Special Tax Notice Regarding Rollovers (RI 37–22). As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. This information collection was previously published in the **Federal Register** on June 4, 2012 at volume 77 FR 33007 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until December 3, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: RI 38–117, Rollover Election, is used to collect information from each payee affected by a change in the tax code so that OPM can make payment in accordance with the wishes of the payee. RI 38–118, Rollover Information, explains the election. RI 37–22, Special Tax Notice Regarding Rollovers, provides more detailed information.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Rollover Election, Rollover Information, and Special Tax Notice Regarding Rollover.

OMB Number: 3206–0212.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 1,500.

Estimated Time per Respondent: 40 minutes.

Total Burden Hours: 1,000.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26867 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Reinstatement of Disability Annuity Previously Terminated Because of Restoration to Earning Capacity, RI 30–9

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0138, Reinstatement of Disability Annuity Previously Terminated Because of Restoration to Earning Capacity, RI 30–9. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. This information collection was previously published in the **Federal Register** on June 4, 2012 at volume 77 FR 33008 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until December 3, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: RI 30–9 informs former disability annuitants of their right to request restoration under title 5, U.S.C. Sections 8337 and 8455. It also specifies the conditions to be met and the documentation required for a person to request reinstatement.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Reinstatement of Disability Annuity Previously Terminated Because of Restoration to Earning Capacity.

OMB Number: 3206–0138.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 200.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 200.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26870 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0143, Request to Disability Annuitant for Information on Physical Condition and Employment, RI 30–1

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0143, Request to Disability Annuitant for Information on Physical Condition and Employment, RI 30–1. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until January 2, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Retirement Services, Union Square 370, 1900 E Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the U.S. Office of Personnel Management, Retirement Services Publications Team, 1900 E Street NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: RI 30–1 is used by persons who are not yet age 60 and who are receiving a disability annuity and are subject to inquiry regarding their medical condition as OPM deems reasonably necessary. RI 30–1 collects information as to whether the disabling condition has changed.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Request to Disability Annuitant for Information on Physical Condition and Employment.

OMB Number: 3206–0143.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 8,000.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 8,000.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26850 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0228, CSRS/FERS Documentation in Support of Disability Retirement Application, SF 3112

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on an extension without change, of a currently approved information collection request (ICR) 3206–0228, CSRS/FERS Documentation in Support of Disability Retirement Application. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until January 2, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Retirement Services, Union Square 370, 1900 E Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: SF 3112 collects information from applicants for disability retirement so that OPM can determine whether to approve a disability retirement. The applicant will only complete Standard Forms 3112A and 3112C. Standard Forms 3112B, 3112D and 3112E will be completed by the immediate supervisor and the employing agency of the applicant.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: CSRS/FERS Documentation in Support of Disability Retirement Application.

OMB Number: 3206–0228.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: SF 3112A = 1,350; SF 3112C = 12,100.

Estimated Time per Respondent: SF 3112A = 30 minutes; SF 3112C = 60 minutes.

Total Burden Hours: 12,775.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26849 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Reemployment of Annuitants

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on an existing information collection request (ICR) 3206–0211, Reemployment of Annuitants. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until January 2, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Retirement Services, Union Square 370, 1900 E Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW., Room 4332, Washington, DC

20415, Attention: Cyrus S. Benson or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: 5 CFR 837.103, Reemployment of Annuitants, requires agencies to collect information from retirees who become employed in Government positions. Agencies need to collect timely information regarding the type and amount of annuity being received so the correct rate of pay can be determined. Agencies provide this information to OPM so a determination can be made whether the reemployed retiree's annuity must be terminated.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: 5 CFR 837.103, Reemployment of Annuitants.

OMB Number: 3206–0211.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 3,000.

Estimated Time per Respondent: 5 minutes.

Total Burden Hours: 250.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26848 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Annuitant's Report of Earned Income, RI 30–2

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0034, Annuitant's Report of Earned Income, RI 30–2. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on June 11, 2012 at Volume 77 FR 34414 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of response.

DATES: Comments are encouraged and will be accepted until December 7, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: RI 30–2 is used annually to determine if disability retirees under age 60 have earned income which will result in the termination of their annuity benefits.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Annuitant's Report of Earned Income.

OMB number: 3206–0034.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 21,000.

Estimated Time per Respondent: 35.

Total Burden Hours: 12,250.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26868 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: It's Time To Sign Up for Direct Deposit or Direct Express, RI 38–128

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0226, It's Time To Sign up for Direct Deposit or Direct Express. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until January 2, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management,

Retirement Services, Union Square 370, 1900 E Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, U.S. Office of Personnel Management, 1900 E Street NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: RI 38–128 is primarily used by OPM to give recent retirees the opportunity to waive Direct Deposit of their annuity payments. The form is sent only if the separating agency did not give the retiring employee this election opportunity. This form may also be used to enroll in Direct Deposit, which was its primary use before Public Law 104–134 was passed. This law requires OPM to make all recurring benefits payments electronically to beneficiaries who live where Direct Deposit is available. Beneficiaries who do not enroll in the Direct Deposit Program will be enrolled in Direct Express.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: It's Time To Sign Up for Direct Deposit or Direct Express.

OMB Number: 3206–0226.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 20,000.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 10,000.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–26866 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Senior Executive Service—Performance Review Board

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the OPM Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Sara Saphos, OPM Human Resources, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, (202) 606–1402.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

U.S. Office of Personnel Management.

John Berry,

Director.

The following have been designated as members of the Performance Review Board of the U.S. Office of Personnel Management:

Elizabeth A. Montoya, Chief of Staff
Elaine D. Kaplan, General Counsel
Angela S. Bailey, Associate Director of Employee Services
Mark W. Lambert, Associate Director of Merit System Audit and Compliance
Jonathan Foley, Director of Planning and Policy Analysis
Joseph S. Kennedy, Deputy Associate Director of Employee Services
Charles D. Grimes, III, Chief Operating Officer
Mark D. Reinhold, Deputy Associate Director for OPM Human Resources—Executive Secretariat

[FR Doc. 2012–26615 Filed 11–1–12; 8:45 am]

BILLING CODE 6325–45–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–12 and CP2013–12; Order No. 1520]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of First-Class Package Service Contract 25 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 5, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add First-Class Package Service Contract 25 to the competitive product list.[1] The Postal Service asserts that First-Class Package Service Contract 25 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–12.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–12.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a

[1] Request of the United States Postal Service to Add First-Class Package Service Contract 25 to the Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, October 25, 2012 (Request).

positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective on the day that the Commission issues all regulatory approvals. *Id.* at 2. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D. The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–12 and CP2013–12 to consider the Request pertaining to the proposed First-Class Package Service Contract 25 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 5, 2012. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–12 and CP2013–12 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 5, 2012.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–26878 Filed 11–1–12; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–13 and CP2013–13; Order No. 1521]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Parcel Select Contract 6 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 5, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Parcel Select Contract 6 to the competitive product list.[1] The Postal Service asserts that Parcel Select Contract 6 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–13.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–13.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective on either the day that the Commission issues all regulatory approvals or on November 1, 2012, whichever occurs later. *Id.* at 7. The contract will expire on October 31, 2015, unless, among other things, either party terminates the agreement upon three months' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract,

[1] Request of the United States Postal Service to Add Parcel Select Contract 6 to the Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, October 25, 2012 (Request).

customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–13 and CP2013–13 to consider the Request pertaining to the proposed Parcel Select Contract 6 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 5, 2012. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–13 and CP2013–13 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 5, 2012.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–26879 Filed 11–1–12; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

DATES AND TIMES: Wednesday, November 14, 2012, at 10:00 a.m.; Thursday, November 15, at 8:30 a.m. and 10:30 a.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza SW., in the Benjamin Franklin Room.

STATUS: Wednesday, November 14, at 10:00 a.m.—Closed; Thursday, November 15, at 8:30 a.m.—Open; and at 10:30 a.m.—Closed

MATTERS TO BE CONSIDERED:

Wednesday, November 14, at 10:00 a.m. (Closed)

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

Thursday, November 15, at 8:30 a.m. (Open)

1. Approval of Minutes of Previous Meetings.
2. Remarks of the Chairman of the Board.
3. Remarks of the Postmaster General and CEO.
4. Committee Reports.
5. FY2012 10K and Financial Statements.
6. FY2013 IFP and Financing Resolution.
7. FY2014 Appropriations Request.
8. Quarterly Service Performance Report.
9. Approval of Annual Report and Comprehensive Statement.
10. Tentative Agenda for the December 11, 2012, meeting in Washington, DC.
11. Election of the Chairman and Vice Chairman of the Board of Governors.

Thursday, November 15, at 10:30 a.m. (Closed—if needed)

1. Continuation of Wednesday's closed session agenda.

CONTACT PERSON FOR MORE INFORMATION: Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

Julie S. Moore.

Secretary.

[FR Doc. 2012–26982 Filed 10–31–12; 4:15 pm]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 2, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service To Add First-Class Package Service Contract 25 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–12, CP2013–11.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–26872 Filed 11–1–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 2, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 25, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service To Add Parcel Select Contract 6 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–13, CP2013–13.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–26873 Filed 11–1–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30253]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

October 26, 2012.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of October 2012. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on November 19, 2012, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street NE., Washington, DC 20549–8010.

Acadia Mutual Funds [File No. 811–22341]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On June 29, 2012, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $6,500 incurred in connection with the liquidation were paid by Acadia Mutual Fund Management, LLC, applicant's investment adviser.

Filing Dates: The application was filed on August 23, 2012, and amended on October 3, 2012.

Applicant's Address: One Penn Plaza, 36th Floor, New York, NY 10119.

BlackRock Investment Quality Municipal Income Trust [File No. 811–7666]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 29, 2012, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $67,715 incurred in connection with the liquidation were paid by BlackRock Advisors, LLC, applicant's investment adviser. Applicant has retained approximately $72,806 in cash to pay for contingent liabilities.

Filing Dates: The application was filed on July 5, 2012, and amended on October 10, 2012.

Applicant's Address: 100 Bellevue Parkway, Wilmington, DE 19809.

Dreyfus Cash Management Plus Inc. [File No. 811–5295]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Dreyfus Cash Management and, on August 25, 2011, made a final distribution to shareholders based on net asset value. Expenses of approximately $78,100 incurred in connection with the reorganization were paid by The Dreyfus Corporation, applicant's investment adviser.

Filing Dates: The application was filed on August 14, 2012, and amended on October 10, 2012.

Applicant's Address: c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

Pearl Mutual Funds [File No. 811–10261]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 1, 2012, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $65,291 incurred in connection with the liquidation were paid by applicant and Pearl Management Company, applicant's investment adviser.

Filing Date: The application was filed on October 5, 2012.

Applicant's Address: 2610 Park Ave., Muscatine, IA 52761.

BlackRock Floating Rate Income Strategies Fund II, Inc. [File No. 811–21464]

BlackRock Diversified Income Strategies Fund, Inc. [811–21637]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicants transferred their assets to BlackRock Floating Rate Income Strategies Fund, Inc. and, on October 8, 2012, made final liquidating distributions to their shareholders based on net asset value. Expenses of approximately $297,156 and $300,345, respectively, incurred in connection with the reorganizations were paid by each applicant.

Filing Date: The applications were filed on October 22, 2012.

Applicants' Address: 100 Bellevue Parkway, Wilmington, DE 19809.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26863 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68110; File No. SR–CBOE–2012–099]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Technical Change to SPY Position Limit Pilot Program and Representation Regarding Timing of Submission of Pilot Report

October 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 17, 2012, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to make a technical amendment to Interpretation and Policy

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

.07 to Rule 4.11 to insert the specific expiration date for a pilot program that eliminates position and exercise limits for physically-settled options on the SPDR S&P 500 ETF Trust (''SPY''). The Exchange is also making a clarifying representation regarding the timing of when the pilot report will be submitted to the Commission. The text of the proposed rule change is available on the Exchange's Web site (http://www.cboe.org/legal), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission recently noticed the Exchange's proposal to amend Interpretation and Policy .07 to Rule 4.11 to eliminate position and exercise limits for physically-settled SPY options purpose to a pilot program (''Program'').[5] This rule change proposes to amend the text of Interpretation and Policy .07 to Rule 4.11 to insert the specific conclusion date of the Program, which is November 27, 2013.

In addition, in the filing to establish the Program, CBOE committed to perform an analysis of the Program after the first twelve (12) months of the pilot program (the ''Pilot Report'').[6] In connection with that commitment, CBOE represents that it will submit the Pilot Report to the Commission at least 30 days prior to the expiration date of the Program.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') for this proposed rule change is the requirement under Section 6(b)(5)[7] that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change seeks to update rule text to insert the specific conclusion date for the Program in a manner that is consistent with the Commission's notice of the Program. In addition, the representation that the Exchange will submit the Pilot Report to the Commission at least 30 days prior to the expiration date of the Program clarifies the administration of the Program by the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[10] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[11] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will permit the text of the Exchange's rules to reflect the expiration date of the Program as soon as possible in order to eliminate any potential confusion. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2012–099 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[5] *See* Securities Exchange Act Release No. 67937 (September 27, 2012) (Notice of Filing and Immediate Effectiveness of Proposed Rule to Eliminate Position and Exercise Limits for Physically-Settled SPY Options on a Pilot Basis) (SR–CBOE–2012–091).

[6] The Pilot Report will detail the size and different types of strategies employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the Program. The Pilot Report will compare the impact of the Program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange will make available to Commission staff data elements relating to the effectiveness of the pilot program

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b-4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–CBOE–2012–099.* This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2012–099 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26853 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68111; File No. SR–OCC–2012–14]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Extension of Review Period of Advance Notice To Establish the Legal and Operational Framework for Providing Central Clearing of OTC Index Options on the S&P 500 Index That Are Negotiated Bilaterally in the Over-the-Counter Market and Submitted to OCC for Clearance

October 26, 2012.

On August 30, 2012, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change and Advance Notice SR–OCC–2012–14 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on September 18, 2012 [3] and the Advance Notice was published for comment in the **Federal Register** on September 27, 2012.[4]

Section 806(e)(1)(G) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [5] provides that changes proposed in an Advance Notice may be implemented if the Commission does not object to the proposed changes within 60 days of the later of (i) the date that the Advance Notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received, unless extended as described below. The date that is 60 days from the time of the filing is October 29, 2012.

Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act,[6] the Commission may extend the review period for an additional 60 days if the proposed changes raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.

The Commission finds it is appropriate to extend the review period for the Advance Notice. In particular, the Advance Notice is novel because OCC does not currently provide clearing services for OTC products and because no registered clearing agency currently provides clearing services for OTC S&P 500 Index options.

Accordingly, the Commission, pursuant to 806(e)(1)(H) of the Clearing Supervision Act,[7] extends the review period for an additional 60 days so that the Commission shall have until December 28, 2012 to issue an objection or non-objection of the Advance Notice (File No. SR–OCC–2012–14).

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26854 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 67835 (September 12, 2012), 77 FR 57602 (September 18, 2012).

[4] Securities Exchange Act Release No. 67906 (September 21, 2012), 77 FR 59431 (September 27, 2012).

[5] 12 U.S.C. 5465(e)(1)(G).

[6] 12 U.S.C. 5465(e)(1)(H).

[7] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68113; File No. SR–OCC–2012–15]

Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change Relating to Financial Reporting by Canadian Clearing Members

October 26, 2012.

I. Introduction

On September 5, 2012, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change SR–OCC–2012–15 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on September 19, 2012.[3] The Commission received no comment letters. This order approves the proposed rule change.

II. Description

The proposed rule change would make technical ''housekeeping'' changes to OCC's By-Laws and Rules relating to financial reporting by Canadian clearing members to reflect the Investment Industry Regulatory Organization of Canada's (''IIROC'') adoption of the International Financial Reporting Standards.

OCC Rule 310, through cross-references to interpretive provisions of OCC Rule 306—Financial Reports and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 67851 (September 13, 2012), 77 FR 58194 (September 19, 2012).

OCC Rule 308-Audits, allows Canadian clearing members to elect to file their Joint Regulatory Financial Questionnaire and Reports (''JRFQR'') with OCC, instead of filing SEC Form X–17A–5, to discharge their financial reporting requirements to OCC. In addition, other provisions of OCC's rules (Rules 301, 302, 303, 304, 306 and 308) reference information Canadian clearing members report on their JRFQR. IIROC, the primary regulator of Canada's securities industry, replaced the JRFQR with ''Form 1'' of the International Financial Reporting Standards. OCC proposes to replace references to the JRFQR within its By-Laws and Rules with references to ''Form 1.'' [4] OCC also proposes to add an Interpretation and Policy to Rule 304 in response to a change in how IIROC requires regulated entities to report capital withdrawals.

OCC, as part of its financial surveillance program, requires Canadian clearing members to submit their JRFQR, a financial report similar to SEC Form X–17A–5, to OCC at the end of each month. OCC also monitors the financial health of such clearing members using the capital levels reported on their JRFQRs. In 2011, IIROC replaced the JRFQR with Form 1. Among other things, Form 1 aligns the reporting of certain financial liabilities to U.S. Generally Accepted Accounting Principles (''GAAP''). Canadian clearing members that use Form 1 report the same, and in some cases more conservative, amounts of regulatory capital to OCC as they had using the JRFQR. Moreover, OCC believes that the change does not impair OCC's ability to conduct diligent financial surveillance of Canadian clearing members. Accordingly, OCC proposes to replace references to the ''JRFQR'' within its By-Laws and Rules with references to ''Form 1.''

The IIROC also altered how its regulated entities report capital withdrawals. IIROC previously required capital withdrawals to be reported on monthly financial reports; however, IIROC amended its standards and now requires firms to obtain approval for withdrawals of capital following notice thereof. OCC had, when applicable, adjusted Canadian clearing member's reported capital levels in light of withdrawals reflected in financial reports in order to determine if the firm's capital falls within OCC's standards. With the change implemented by IIROC, that information is no longer be available to OCC via monthly financial reports submitted by Canadian clearing members. To ensure it is aware of such capital withdrawals, OCC proposes to add an Interpretation and Policy to Rule 304, which would require Canadian clearing members to submit capital withdrawal notifications to OCC when such requests are submitted to IIROC.

[4] OCC does not propose to amend Rule 310 since it does not specifically use the term, ''Joint Regulatory Financial Questionnaire and Reports.''

III. Discussion

Section 17A(b)(3) (F) of the Act [5] requires that, among other things, a clearing agency be organized and its rules designed to safeguard securities and funds in its custody or control or for which it is responsible. The proposed rule change will allow OCC to efficiently monitor the financial health of its clearing members and is intended to facilitate Canadian clearing members' compliance with OCC's By-Laws and Rules by aligning OCC's financial reporting requirements, as they pertain to Canadian clearing members, with those of the IIROC. It is also intended to ensure OCC has appropriate information about Canadian clearing members' capital withdrawals, which will no longer be reported to OCC on a monthly basis. As such, it will help OCC to safeguard the securities and funds in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [6] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–OCC–2012–15) be, and hereby is, approved.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26856 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78q–1(b)(3)(F)

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(2).

[8] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68115; File No. SR–NASDAQ–2012–090]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Rule 4626—Limitation of Liability

October 26, 2012.

I. Introduction

On July 23, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 4626—Limitation of Liability (''accommodation proposal''). The proposed rule change was published for comment in the **Federal Register** on August 1, 2012.[3] The Commission received 11 comment letters on this proposal [4] and a response letter from Nasdaq.[5] On September 12, 2012, the Commission extended the time period in which to either approve the accommodation proposal, disapprove the accommodation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Sis DeMarco, Chief Compliance Officer, Triad Securities Corp., dated August 20, 2012 (''Triad Letter''); Eugene P. Torpey, Chief Compliance Officer, Vandham Securities Corp., dated August 21, 2012 (''Vandham Letter''); John C. Nagel, Managing Director and General Counsel, Citadel LLC, dated August 21, 2012 (''Citadel Letter''); Benjamin Bram, Watermill Institutional Trading LLC, dated August 22, 2012 (''Bram Letter''); Daniel Keegan, Managing Director, Citigroup Global Markets Inc., dated August 22, 2012 (''Citi Letter''); Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated August 22, 2012 (''SIFMA Letter''); Mark Shelton, Group Managing Director and General Counsel, UBS Securities LLC, dated August 22, 2012 (''UBS Letter''); Andrew J. Entwistle and Vincent R. Cappucci, Entwistle & Cappucci LLP, dated August 22, 2012 (''Entwistle Letter''); Douglas G. Thompson, Michael G. McLellan, and Robert O. Wilson, Finkelstein Thompson LLP, Christopher Lovell, Victor E. Stewart, and Fred T. Isquith, Lovell Stewart Halebian Jacobson LLP, Jacob H. Zamansky and Edward H. Glenn, Zamansky & Associates LLC, dated August 22, 2012 (''Thompson Letter''); James J. Angel, Associate Professor of Finance, Georgetown University, McDonough School of Business, dated August 23, 2012 (''Angel Letter''); and Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated August 29, 2012 (''Knight Letter'').

[5] *See* letter to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ Stock Market LLC, dated September 17, 2012 (''Nasdaq Letter'').

proposal, or to institute proceedings to determine whether to approve or disapprove the accommodation proposal, to October 30, 2012.[6] This order institutes proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the accommodation proposal.

II. Description of Proposal[8]

Pursuant to existing Nasdaq Rule 4626(a), Nasdaq and its affiliates are not liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use.[9] However, existing Nasdaq Rule 4626(b) allows Nasdaq to compensate users of the Nasdaq Market Center for losses directly resulting from the systems' actual failure to correctly process an order, Quote/Order, message, or other data, provided the Nasdaq Market Center has acknowledged receipt of the order, Quote/Order, message, or data. Nasdaq's payment for all claims made by all market participants related to the use of the Nasdaq Market Center during a single calendar month shall not exceed the larger of $500,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy.[10]

As set forth in more detail in the Notice, Nasdaq proposes to add subsection (3) to Nasdaq Rule 4626(b) to establish a voluntary accommodation program for certain claims arising from the initial public offering (''IPO'') of Facebook, Inc. (''Facebook'') on May 18, 2012 (collectively ''Facebook IPO'').[11] Specifically, Nasdaq proposes to compensate market participants for certain claims related to system difficulties in the Nasdaq Halt and Imbalance Cross process (''Cross'')[12] in connection with the Facebook IPO in an amount not to exceed $62 million.[13] Further, as proposed, claims for compensation must arise solely from realized or unrealized direct trading losses from four specific categories of Cross orders: (i) Sell Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at $42.00 or less, and that did not execute; (ii) sell Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at $42.00 or less, and that executed at a price below $42.00; (iii) buy Cross orders priced at exactly $42.00 and that were executed in the Cross, but not immediately confirmed; and (iv) buy Cross orders priced above $42.00 and that were executed in the Cross, but not immediately confirmed, but only to the extent entered with respect to a customer[14] that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member, also prior to 1:50 p.m.[15]

According to proposed Nasdaq Rule 4626(b)(3)(B), the measure of loss for the Cross orders described in (i), (iii), and (iv) above would be the lesser of: (a) The differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and the actual execution price received; or (b) the differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and a benchmark price of $40.527.[16] With respect to Cross orders described in (iv) above, the amount of loss would be reduced by 30 percent.[17] Further, according to proposed Rule 4626(b)(3)(B), the measure of loss for the Cross orders described in (ii) above would be the differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and the actual execution price received.[18]

With respect to the process for submitting claims pursuant to proposed Nasdaq Rule 4626(b)(3), all claims must be submitted in writing no later than seven days after this accommodation proposal is approved by the Commission.[19] As proposed, the Financial Industry Regulatory Authority, Inc. (''FINRA'') would process and evaluate all the claims submitted, using the standards set forth in Nasdaq Rule 4626.[20] FINRA would then provide to the Nasdaq Board of Directors and the Board of Directors of The NASDAQ OMX Group, Inc. an analysis of the total value of eligible claims submitted under proposed Nasdaq Rule 4626(b)(3), and Nasdaq would thereafter file with the Commission a proposed rule change setting forth the amount of eligible claims and the amount it proposes to

[6] *See* Securities Exchange Act Release No. 67842 (September 12, 2012), 77 FR 57171 (September 17, 2012).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] In issuing this order, the Commission neither makes any findings nor expresses any opinion with regard to Nasdaq's representations and interpretations contained in its accommodation proposal.

[9] According to Nasdaq Rule 4626(a), any losses, damages, or other claims, related to a failure of the Nasdaq Market Center to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the Nasdaq Market Center is absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the Nasdaq Market Center.

[10] *See* Nasdaq Rule 4626(b)(1). With respect to the aggregate of all claims made by all market participants during a single calendar month related to a systems malfunction or error of the Nasdaq Market Center concerning locked/crossed market, trade through protection, market maker quoting, order protection, or firm quote compliance functions of the market participant, to the extent such functions are electronically enforced by the Nasdaq trading system and where Nasdaq determines in its sole discretion that such systems malfunction or error was caused exclusively by Nasdaq and no outside factors contributed to the systems malfunction or error, Nasdaq's payment during a single calendar month will not exceed the larger of $3,000,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. *See* Nasdaq Rule 4626(b)(2). The Facebook initial public offering does not implicate the types of systems errors or malfunctions described in Nasdaq Rule 4626(b)(2).

[11] In addition to adding proposed subsection (b)(3) to Nasdaq Rule 4626, Nasdaq proposes to make certain technical amendments to existing subsections of that rule. *See, e.g.,* proposed Nasdaq Rule 4626(b)(4) and (b)(6).

[12] *See* Nasdaq Rule 4753.

[13] *See* proposed Nasdaq Rule 4626(b)(3); Notice, *supra* note 3, at 47507.

[14] As proposed, unless Nasdaq Rule 4626 states otherwise, the term ''customer'' includes any unaffiliated entity upon whose behalf an order is entered, including any unaffiliated broker or dealer. *See* proposed Nasdaq Rule 4626(b)(3)(A).

[15] *See* proposed Nasdaq Rule 4626(b)(3)(A); Notice, *supra* note 3, at 45710–11. In addition, proposed Nasdaq Rule 4626(b)(3)(C) states that alleged losses arising in any form or that in any way resulted from any other causes would not be considered losses eligible for the proposed accommodations. Proposed Nasdaq Rule 4626(b)(3)(C) sets forth a non-exhaustive list of examples of such losses.

[16] $40.527 constitutes the volume-weighted average price (''VWAP'') of Facebook stock on May 18, 2012, between 1:50 p.m. ET and 2:35 p.m. ET. *See* proposed Nasdaq Rule 4626(b)(3)(B). *See also* Notice, *supra* note 3, at 45710–11 (describing Nasdaq's rationale for establishing the $40.527 benchmark).

[17] *See* proposed Nasdaq Rule 4626(b)(3)(B); *see also* Notice, *supra* note 3, at 45710 (describing Nasdaq's rationale for lowering the amount of eligible losses for the fourth category of Cross orders).

[18] Each member's direct trading losses calculated in accordance with proposed Nasdaq Rule 4626(b)(3)(A) and (B) are referred to as the ''member's share.'' *See* proposed Nasdaq Rule 4626(b)(3)(B).

[19] *See* proposed Nasdaq Rule 4626(b)(3)(D). According to Nasdaq, notice of approval would be publicly posted on the Nasdaq Trader Web site at *www.nasdaqtrader.com* and provided directly to all member firms via an Equity Trader Alert. *See* Notice, *supra* note 3, at 45712.

[20] *See* proposed Nasdaq Rule 4626(b)(3)(D). FINRA may request such supplemental information as it deems necessary to assist its evaluation of claims. *See id.* According to Nasdaq, FINRA's role would be limited to measuring data against the benchmarks established under Nasdaq Rule 4626(b)(3) to ascertain the eligibility and value of each member's claims. *See* Notice, *supra* note 3, at 45712. Further, Nasdaq represents that FINRA staff assessing the claims would not be involved in providing regulatory services to any Nasdaq market, and they would not have purchased Facebook stock during Nasdaq's IPO opening process or currently own Facebook stock. *See id.*

pay to its members.[21] All payments would be made in cash and would not be made until the proposed rule change setting forth the amount of eligible claims becomes final and effective.[22]

Furthermore, as proposed, in order to receive payment under proposed Nasdaq Rule 4626(b)(3), not later than seven days after the effective date of the proposed rule change setting forth the amount of eligible claims, the member must submit to Nasdaq an attestation detailing the amount of customer compensation [23] and covered proprietary losses.[24] Failure to provide the required attestation within the specified time period would void the member's eligibility to receive compensation under proposed Nasdaq Rule 4626(b)(3).[25] In addition, under proposed Nasdaq Rule 4626(b)(3)(H), all payments to members under the accommodation proposal would be contingent upon the execution and delivery to Nasdaq of a release by the member of all claims by it or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook IPO Cross or any actions or omissions related in any way to that Cross.[26] The failure to provide this release within 14 days after the effective date of the proposed rule change setting forth the amount of eligible claims would void the member's eligibility to receive compensation pursuant to proposed Nasdaq Rule 4626(b)(3).[27]

With respect to the priority of payment under proposed Nasdaq Rule 4626(b)(3), payments would be made in two tranches.[28] First, if the member has provided customer compensation, the member would receive an amount equal to the lesser of the member's share or the amount of customer compensation.[29] Second, the member would receive an amount with respect to covered proprietary losses, however, the sum of payments to a member would not exceed the member's share.[30] According to proposed Nasdaq Rule 4626(b)(3)(G), if the amount calculated under the first tranche (*i.e.,* customer compensation) exceeds $62 million, accommodation would be prorated among members eligible to receive accommodation under the first tranche. If the first tranche is paid in full and the amount calculated under the second tranche exceeds the funds remaining from the $62 million accommodation pool, such funds would be prorated among members eligible to receive accommodation under the second tranche.[31] Further, if a member's eligibility to receive funds is voided under proposed Nasdaq Rule 4626(b)(3), and the funds payable to other members must be prorated, the funds available to pay other members would be increased accordingly.[32]

III. Summary of Comments and Nasdaq's Response

As previously noted, the Commission received 11 comment letters on the accommodation proposal and one response letter from Nasdaq.[33] Eight commenters raised concerns with respect to the accommodation proposal,[34] two commenters expressed their support for the accommodation proposal,[35] and one commenter addressed the issue of exchange liability more broadly.[36]

Commenters raised concerns in the following areas, each of which is discussed in greater detail below: (1) The requirement that market participants release all other potentially valid claims as a condition to participation in the accommodation program; (2) Nasdaq's calculation and use of a benchmark price of $40.527; (3) the categories of claim-eligible trading losses; (4) the amount of the accommodation pool; (5) regulatory immunity from private suits and limitations on liability; (6) the applicability of Nasdaq Rule 4626; (7) the impact of approval of the accommodation proposal on pending litigation; and (8) two procedural issues.

A. Release of All Claims Relating to the Facebook IPO Cross

Several commenters expressed concerns that payment to eligible claimants are conditioned upon the member firm executing a release of claims by the firm or its affiliates against Nasdaq for losses associated with the Facebook IPO on May 18, 2012.[37] Specifically, one commenter indicated that requiring execution of the release as a precondition to participation in the accommodation proposal creates a ''fundamentally unfair dilemma'' for members.[38] According to the commenter, Nasdaq members must choose to execute a release of claims and participate in the accommodation program, which may not make the member whole, or pursue ''cost-and resource-intensive alternative avenues of recovery.'' [39] Another commenter noted that releases of claims are typically the product of commercial, arms-length negotiation and not part of a rule imposed by a regulatory authority.[40] Finally, one commenter suggested that Nasdaq members be given the option to ''opt in'' to the accommodation program on an order by order basis or a firm by firm basis.[41]

In response, Nasdaq asserted that the release requirement is fair, reasonable, and furthers the objectives of Section 6(b)(5) of the Act [42] because it is ''aimed at avoiding unnecessary litigation and ensuring equal treatment of all members receiving funds under the [accommodation] [p]roposal.'' [43] Moreover, Nasdaq noted that participation in the accommodation program and execution of the release are entirely voluntary.[44] Accordingly, members that wish to forego participation in the accommodation program and pursue claims against

[21] *See* proposed Nasdaq Rule 4626(b)(3)(E). According to Nasdaq, the report that FINRA prepares for Nasdaq on its analysis of the eligibility of claims also would be provided to the public members of FINRA's Audit Committee. *See* Notice, *supra* note 3, at 45712.

[22] *See* proposed Nasdaq Rule 4626(b)(3)(E).

[23] According to proposed Nasdaq Rule 4626(b)(3)(F)(i), ''customer compensation'' means the amount of compensation, accommodation, or other economic benefit provided or to be provided by the member to its customers (other than customers that were brokers or dealers trading for their own account) in respect of trading in Facebook on May 18, 2012.

[24] According to proposed Nasdaq Rule 4626(b)(3)(F)(ii), ''covered proprietary losses'' means the extent to which the losses reflected in the member's share were incurred by the member trading for its own account or for the account of a customer that was a broker or dealer trading for its own account.

[25] *See* proposed Nasdaq Rule 4626(b)(3)(F). In addition, each member must maintain books and records that detail the nature and amount of customer compensation and covered proprietary losses. *See id.* According to Nasdaq, it, through FINRA, would expect to examine the accuracy of a member's attestation at a later date. *See* Notice, *supra* note 3, at 45712.

[26] *See* proposed Nasdaq Rule 4626(b)(3)(H); Notice, *supra* note 3, at 45713 (explaining the purpose of the release requirement).

[27] *See* proposed Nasdaq Rule 4626(b)(3)(H).

[28] *See* proposed Nasdaq Rule 4626(b)(3)(G).

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See supra* notes 4 and 5.

[34] *See* Triad Letter; Vandham Letter; Bram Letter; Citi Letter; SIFMA Letter; UBS Letter; Entwistle Letter; and Thompson Letter, *supra* note 4.

[35] *See* Citadel Letter and Knight Letter, *supra* note 4.

[36] *See* Angel Letter, *supra* note 4. The Angel Letter does not opine on the proposal, but rather comments more generally on what the appropriate parameters of liability should be for national securities exchanges.

[37] *See* UBS Letter, *supra* note 4, at 3–4; Vandham Letter, *supra* note 4, at 3; and Knight Letter, *supra* note 4, at 2.

[38] *See* UBS Letter, *supra* note 4, at 3.

[39] *See id.*

[40] *See* Knight Letter, *supra* note 4, at 2.

[41] *See* Vandham Letter, *supra* note 4, at 3.

[42] 15 U.S.C. 78f(b)(5).

[43] *See* Nasdaq Letter, *supra* note 5, at 5.

[44] *See id.*

Nasdaq instead remain free to do so.[45] Nasdaq also noted that the use of a release is routine in the context of a payment in settlement of a disputed claim, including those brought against regulated entities.[46] Finally, Nasdaq argued that allowing members to participate in the accommodation program without releasing Nasdaq from other claims related to the Facebook IPO Cross would, in effect, ''subsidize the costs of future litigation against itself.'' [47]

B. Nasdaq's Uniform Benchmark Price

Several commenters expressed concern with Nasdaq's calculation and use of the uniform benchmark price of $40.527 to determine the amount of compensation owed to a member under the accommodation proposal.[48] Generally, these commenters stated that, contrary to Nasdaq's assertion, a ''reasonably diligent member'' would not have mitigated losses during the first forty-five minutes after execution reports were delivered to firms.[49] More specifically, two commenters stated that the uniform benchmark price should be based on a VWAP of Facebook stock on Monday, May 21, 2012.[50]

In its response letter, Nasdaq reasserted that the use of the VWAP of Facebook stock during the 45 minute window after 1:50 p.m. is appropriate as the benchmark price because 45 minutes provided members enough time to identify and mitigate any unexpected losses or unanticipated positions.[51]

C. Nasdaq's Categories of Claim-Eligible Trading Losses

Several commenters stated that the types of orders eligible to receive compensation under the accommodation proposal are too narrowly defined.[52] Two commenters believe that Nasdaq should provide compensation for losses resulting from ''downstream operational, technological and customer issues.'' [53] One commenter stated that Nasdaq's system failures, specifically the failure to deliver execution reports for more than two hours after trading began, ''caused direct and severe damage'' to the commenter and other market participants and led to direct trading losses.[54] Another commenter argued that customer orders entered before 11:11 a.m. on May 18, 2012, that were ''cancel/replaced'' between 11:11 a.m. and 11:30:09 a.m. should be treated differently from other orders entered during such time and should be entitled to full compensation.[55]

Another commenter observed that the accommodation proposal provides no direct compensation to ''ordinary retail investors'' and does not guarantee that retail investors would receive any compensation for losses.[56] Because Nasdaq's proposal contemplates paying retail customers through Nasdaq member broker-dealers, the commenter expressed concern that there is no guarantee that compensation will ultimately be passed back to the retail investor, especially in instances where the member's ''customer'' is another broker-dealer.[57]

Nasdaq responded that the question before the Commission is only whether the proposal is consistent with the requirements of the Act.[58] Nasdaq asserted that commenters have not argued that the proposal ''discriminates unfairly'' among members or that it is otherwise inconsistent with the requirements of the Act.[59] Nasdaq stated its belief that none of the comments provide a basis for the Commission to determine that a modification to the methodology and criteria it proposed ''is necessary to remedy any inconsistency with the Exchange Act.'' [60] With respect to retail investors, Nasdaq stated that its accommodation proposal would benefit retail investors with eligible claims even though Nasdaq has no direct relationship with them.[61] Nasdaq noted that the accommodation proposal requires each member to submit an attestation detailing the amount of compensation provided or to be provided by the member to its customers.[62] Moreover, Nasdaq pointed out that accommodation payments are to be made in two tranches with the first tranche going toward retail customer claims.[63]

D. $62 Million Accommodation Pool Is Insufficient

Several commenters argued that the proposed $62 million accommodation pool is an insufficient amount to compensate market participants harmed by Nasdaq's systems issues.[64]

Nasdaq responded that commenters' objections to the amount of compensation are ''unpersuasive'' because the Commission has already determined that rules, such as existing Nasdaq Rule 4626, limiting exchange liability are consistent with the Act.[65] Accordingly, if the accommodation proposal is disapproved, Nasdaq asserted that the current limitation on liability of $500,000 would apply.[66] Nasdaq emphasized that members who believe the amount of compensation offered is insufficient or otherwise dislike the accommodation proposal may elect not to participate.[67] Nasdaq also stated that the purpose of the accommodation proposal is ''not to pay all claims of losses alleged with respect to the trading of Facebook stock,'' but rather the purpose is ''to modify an existing rule that limits Nasdaq's liability to $500,000 in order to make additional funds available to compensate members and their customers for the categories of loss

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See* Triad Letter, *supra* note 4, at 1–3; Vandham Letter, *supra* note 4, at 2; Bram Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 and 10. According to Nasdaq, the forty-five minutes after execution reports were delivered ''would have been ample time for a reasonably diligent member to have identified any unexpected customer losses or unanticipated customer positions, and taken steps to mitigate or liquidate them.'' *See* Notice, *supra* note 3, at footnote 24.

[49] *See* Triad Letter, *supra* note 4, at 1–3; Vandham Letter, *supra* note 4, at 2; Bram Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 and 10.

[50] *See* Triad Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 (stating that the benchmark price should be the VWAP of Facebook stock between the opening price on Monday, May 21, 2012 and the price at noon on that same day).

[51] *See* Nasdaq Letter, *supra* note 5, at 3. Specifically, Nasdaq noted that: (i) All orders and cancellations, including those entered between 11:11 a.m. and 11:30 a.m., were ''executed, cancelled, or released into the market'' by 1:50 p.m.; (ii) confirmations of all trades and cancellations had been disseminated to members by 1:50 p.m.; and (iii) Nasdaq began reporting a firm bid and ask to the tape and all data feeds were operating normally by 1:50 p.m. *See id.,* at 3–4. Nasdaq also stated that it issued a ''System Status message'' informing members that all systems were operating normally at 1:57 p.m. *See id.,* at 4.

[52] *See* UBS Letter, *supra* note 4, at 2–3; Citi Letter, *supra* note 4, at 7–10; and Vandham Letter, *supra* note 4, at 3.

[53] *See* UBS Letter, *supra* note 4, at 3; Citi Letter, *supra* note 4, at 7–10 (noting that ''[i]n some cases, investors submitted multiple redundant orders based on the belief that the orders were not going through'' and ''[i]n other cases, investors submitted cancelations before receiving order confirmations, but were stuck with the stock.'').

[54] *See* UBS Letter, *supra* note 4, at 3.

[55] *See* Vandham Letter, *supra* note 4, at 3. The commenter believes that Nasdaq's failure to properly account for cancel/replaced orders resulted in Nasdaq ''taking the profits generated from certain clients to distribute amongst a larger group.'' *See id.*

[56] *See* Thompson Letter, *supra* note 4, at 3–4.

[57] *See id.,* at 11.

[58] *See* Nasdaq Letter, *supra* note 5, at 2.

[59] *See id.*

[60] *See id.,* at 4.

[61] *See id.,* at 8.

[62] *See id.*

[63] *See id.*

[64] *See* UBS Letter, *supra* note 4, at 2 (estimating that its losses are ''in excess of $350 million'' and describing Nasdaq's proposal to pay $62 million in the aggregate as ''woefully inadequate''); *see also* Thompson Letter, *supra* note 4, at 4, 20.

[65] *See* Nasdaq Letter, *supra* note 5, at 2.

[66] *See id.*

[67] *See id.,* at 2–3.

defined in the [accommodation] [p]roposal * * * .'' [68]

E. Regulatory Immunity From Private Suits and Limitations on Liability

Several commenters stated that Nasdaq is not entitled to immunity from liability because it was acting in its ''for profit'' capacity in its handling of the Facebook IPO, rather than acting in its ''regulatory capacity'' as a self-regulatory organization.[69] However, the two commenters that supported the accommodation proposal noted that the broader issues of regulatory immunity and limitations on exchange liability should be considered separately from Nasdaq's accommodation proposal.[70]

Nasdaq responded that the Commission's task with regard to the accommodation proposal is only to determine whether the proposed rule change is consistent with the Act, and the Commission does not need to address the issue of regulatory immunity to do so.[71]

F. Applicability of Nasdaq Rule 4626

According to one commenter, market participants' losses ''resulted not from the type of ordinary system failures contemplated by Rule 4626 * * *, but rather from a known design flaw that resulted in a similar technology issue dating back to Fall 2011, as well as Nasdaq's high-risk, profit-oriented behavior prior to and during the IPO * * *'' [72] This commenter argued that it is improper to use Rule 4626 to create an accommodation fund in connection with the Facebook IPO because the losses suffered in connection with the IPO do not fall within the parameters of Rule 4626.[73]

Nasdaq emphasized in response that Rule 4626 is a pre-existing Commission approved rule and that the rule squarely applies to Nasdaq's systems issues related to the Facebook IPO.[74]

G. Impact on Pending Litigation

Two commenters expressed concern that Commission approval of the accommodation proposal might negatively impact other adjudications of disputes with Nasdaq regarding the Facebook IPO.[75] The commenters expressed concern that courts or other adjudicative bodies might interpret Commission approval of the accommodation proposal as defining or approving the classes of eligible claimants as restricted only to market participants who submitted one of the four enumerated Cross order types.[76] The Nasdaq Letter did not specifically respond to commenters' concerns on this issue.

H. Procedural Concerns

Several commenters raised procedural concerns regarding the implementation of the accommodation proposal.[77] Two commenters noted that Nasdaq should waive the one-year time limit to bring actions against Nasdaq in Sections 18(H) and 19 of its Service Agreement given the amount of time it could take to implement the compensation process set forth in the proposed rule change.[78] Three commenters stated that Nasdaq member firms should not be required to release Nasdaq from liability before member firms receive notice of a final payment amount pursuant to the accommodation proposal.[79]

Nasdaq responded that commenters' requests to extend the one-year time limit for members to bring claims against Nasdaq improperly ask the Commission to interfere with existing contractual relationships that have no bearing on whether Nasdaq Rule 4626 should be amended.[80] As for concerns that claimants might have to release their claims against Nasdaq prior to receiving compensation under the accommodation proposal, Nasdaq stated that it does not object to the release becoming effective upon payment.[81]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2012–090 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [82] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[83] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act [84] requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, Nasdaq's accommodation proposal would amend its existing Rule 4626 to provide $62 million to compensate certain types of claims arising in connection with the Facebook IPO Cross on May 18, 2012. Further, as proposed, a Nasdaq member must execute a release of all claims by the member or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook IPO Cross or to any actions or omissions related in any way to that Cross in order to receive any payment under proposed Nasdaq Rule 4626(b)(3). The concerns articulated by commenters, including the limited categories of claims eligible for compensation, the method of determining losses for certain categories of eligible claims, and the requirement that a member waive all claims against

[68] *See id.,* at 4.

[69] *See* Citi Letter, *supra* note 4, at 2–4 and 12–15; SIFMA Letter, *supra* note 4, at 2–4; Thompson Letter, *supra* note 4, at 8–10.

[70] *See* Citadel Letter, *supra* note 4, at 2; Knight Letter, *supra* note 4, at 2.

[71] *See* Nasdaq Letter, *supra* note 5, at 6–7.

[72] *See* Citi Letter, *supra* note 4, at 4, 15–16.

[73] *See id.*

[74] *See* Nasdaq Letter, *supra* note 5, at 5–6.

[75] *See* Thompson Letter, *supra* note 4, at 4–8; *see also* Entwistle Letter, *supra* note 4, at 2.

[76] *See id.*

[77] *See* Citi Letter, *supra* note 4, at 16; SIFMA Letter, *supra* note 4, at 5; and Knight Letter, *supra* note 4, at 2.

[78] Section 18(H) provides ''that any claim, dispute, controversy, or other matter in question arising out of the agreement must be made no later than one year after it has arisen. Section 19 of the agreement provides that any claim, dispute, controversy, or other matter in question arising out of the agreement is expressly waived if it is not brought within that period.'' *See* SIFMA Letter, *supra* note 4, at 5; *see also* Citi Letter, *supra* note 4, at 16.

[79] *See* SIFMA Letter, *supra* note 4, at 5–6; Citi Letter, *supra* note 4, at 16; and Knight Letter, *supra* note 4, at 2.

[80] *See* Nasdaq Letter, *supra* note 5, footnote 11. Nasdaq believes that members who voluntarily choose to proceed with their claims outside of the accommodation proposal ''should do so under the terms and conditions they have agreed to, and not seek to use the Commission's notice and comment process to renegotiate their prior contractual commitments.'' *See id.*

[81] *See id.,* at footnote 9. Nasdaq also stated that it intends to implement the accommodation proposal such that a member would be aware of the results of its claim prior to being required to execute a release. *See id.*

[82] 15 U.S.C. 78s(b)(2)(B).

[83] 15 U.S.C. 78s(b)(2)(B).

[84] 15 U.S.C. 78f(b)(5).

Nasdaq or its affiliates for losses that relate to the Facebook IPO Cross, raise questions about whether the accommodation proposal would promote just and equitable principles of trade, protect investors and the public interest, and not be designed to permit unfair discrimination between market participants.[85]

Accordingly, in light of the concerns raised by commenters, the Commission believes that questions are raised as to whether Nasdaq's accommodation proposal is consistent with the requirements of Section 6(b)(5) of the Act, including whether the accommodation proposal would promote just and equitable principles of trade, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the accommodation proposal. In particular, the Commission invites the written views of interested persons concerning whether the accommodation proposal is consistent with Section 6(b)(5)[86] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[87]

Interested persons are invited to submit written data, views, and arguments regarding whether the accommodation proposal should be approved or disapproved by November 23, 2012. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 7, 2012. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–090 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2012–090. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the accommodation proposal that are filed with the Commission, and all written communications relating to the accommodation proposal between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–090 and should be submitted on or before November 23, 2012. Rebuttal comments should be submitted by December 7, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[88]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26857 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[85] *See supra* Sections III.A.–C.

[86] 15 U.S.C. 78f(b)(5).

[87] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Reps. No. 75, 94th Cong., 1st Sess. 30 (1975).

[88] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68109; File No. SR–CME–2012–40]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add One Series of Credit Default Index Swaps Available for Clearing

DATE: October 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2012, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III below, which Items have been prepared primarily by CME. CME filed the proposed rule change pursuant to Section 19(b)(3)(A)[3] of the Act and Rule 19b–4(f)(4)(i)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is below. *Italicized* text indicates additions; [bracketed] text indicates deletions.

* * * * *

CHICAGO MERCANTILE EXCHANGE INC. RULEBOOK

Rule 100–80203—No Change.

* * * * *

CME Chapter 802 Rules: Appendix 1

APPENDIX 1

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(i).

CDX INDICES

CDX Index	Series	Termination date (scheduled termination date)
CDX North American Investment Grade (CDX.NA.IG)	*8*	*20 June 2014.*
		20 June 2017.
CDX North American Investment Grade (CDX.NA.IG)	9	20 Dec 2012.
		20 Dec 2014.
		20 Dec 2017.
CDX North American Investment Grade (CDX.NA.IG)	10	20 Jun 2013.
		20 Jun 2015.
		20 Jun 2018.
CDX North American Investment Grade (CDX.NA.IG)	11	20 Dec 2011.
		20 Dec 2013.
		20 Dec 2015.
		20 Dec 2018.
CDX North American Investment Grade (CDX.NA.IG)	12	20 Jun 2012.
		20 Jun 2014.
		20 Jun 2016.
		20 Jun 2019.
CDX North American Investment Grade (CDX.NA.IG)	13	20 Dec 2012.
		20 Dec 2014.
		20 Dec 2016.
		20 Dec 2019.
CDX North American Investment Grade (CDX.NA.IG)	14	20 Jun 2013.
		20 Jun 2015.
		20 Jun 2017.
		20 Jun 2020.
CDX North American Investment Grade (CDX.NA.IG)	15	20 Dec 2013.
		20 Dec 2015.
		20 Dec 2017.
		20 Dec 2020.
CDX North American Investment Grade (CDX.NA.IG)	16	20 Jun 2014.
		20 Jun 2016.
		20 Jun 2018.
		20 Jun 2021.
CDX North American Investment Grade (CDX.NA.IG)	17	20 Jun 2015.
		20 Jun 2017.
		20 Jun 2018.
		20 Jun 2022.
CDX North American Investment Grade (CDX.NA.IG)	18	20 Dec 2014.
		20 Dec 2016.
		20 Dec 2018.
		20 Dec 2022.
CDX North American Investment Grade (CDX.NA.IG)	19	20 Dec 2015.
		20 Dec 2017.
		20 Dec 2019.
		20 Dec 2022.
CDX North America High Yield (CDX.NA.HY)	11	20 Dec 2013.
CDX North America High Yield (CDX.NA.HY)	12	20 Jun 2014.
CDX North America High Yield (CDX.NA.HY)	13	20 Dec 2014.
CDX North America High Yield (CDX.NA.HY)	14	20 Jun 2015.
CDX North America High Yield (CDX.NA.HY)	15	20 Dec 2015.
CDX North America High Yield (CDX.NA.HY)	16	20 Jun 2016.
CDX North America High Yield (CDX.NA.HY)	17	20 Dec 2016.
CDX North America High Yield (CDX.NA.HY)	18	20 Jun 2017.
CDX North America High Yield (CDX.NA.HY)	19	20 Dec 2017.

* * * * *

Rule 80301–End—No change

* * * * *

II. Self-Regulatory Organizations Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

CME offers clearing services for certain credit default swap index products. Currently, CME offers clearing of the Markit CDX North American Investment Grade Index Series 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 and also offers clearing of the Markit CDX North

American High Yield Index Series 11, 12, 13, 14, 15, 16, 17, 18 and 19.

The proposed rule changes would expand CME's Markit CDX North American Investment Grade (''CDX IG'') Index product offerings by adding Series 8 to the current product set.

The proposed rule changes are immediately effective upon filing but will become operational on October 15, 2012. CME notes that it will also certify the proposed rule changes that are the subject of this filing to its primary regulator, the Commodity Futures Trading Commission (''CFTC''). The text of the CME proposed rule amendments is included above, with additions italicized and deletions in brackets.

The proposed CME rule amendments merely incorporate one additional series to CME's existing offering of broad-based Markit CDX North American Investment Grade credit default swaps. As such, the proposed amendments simply effect changes to an existing service of a registered clearing agency that (1) do not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) do not significantly affect the respective rights or obligations of the clearing agency or persons using its clearing agency services. Therefore, the proposed rule change is properly filed under Section 19(b)(3)(A) and Rule 19b–4(f)(4)(i) thereunder.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)[5] of the Act and Rule 19b–4(f)(4)(i)[6] thereunder because it effects a change in an existing service of a registered clearing agency that (1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CME–2012–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CME–2012–40. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on CME's Web site at *http://www.cmegroup.com/market-regulation/files/sec_19b–4_12–40.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CME–2012–40 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary .

[FR Doc. 2012–26852 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(4)(i).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68116; File No. SR–BX–2012–069]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Elimination of Market Maker Pre-Opening Obligations on BX Options

October 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 16, 2012, NASDAQ OMX BX, Inc. (''BX'' or ''BX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BX is filing with the Commission a proposal to modify Chapter VII, Section 6 (Market Maker Quotations), to eliminate market maker pre-opening obligations on BX Options. The Exchange also proposes to modify Chapter VII, Section 5 (Obligations of Market Makers) to conform it to Section 6.

The Exchange requests that the Commission waive the 30-day operative

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

delay period contained in Rule 19b–4(f)(6)(iii) of the Act.[3]

The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com/,* at BX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to modify Chapter VII, Section 6 of the BX Options rulebook to remove obligations imposed on BX Options market makers (''Market Makers'')[4] to participate in the pre-opening phase in terms of continuous quotes; and to conform Section 5 to Section 6 as modified. This is done to put Market Makers on par with the market makers on other options exchanges that have not had pre-market continuous quoting obligations.[5]

The Exchange notes that its proposal is similar to a recent rule change to Chapter VII, Section 6 of the NASDAQ Options Market (''NOM'') rulebook.[6] The proposed rule change language to Chapter VII, Section 6 of the BX Options rulebook is identical in all respects to that of the rule change language to Chapter VII, Section 6 of the NOM rulebook.[7]

Currently, Section 6 of Chapter VII requires that a Market Maker must enter continuous bids and offers in options in which the Market Maker is registered on BX Options, an all-electronic market. Specifically, Section 6(d)i. requires that on a daily basis a Market Maker must: (1) Participate in the pre-opening phase; and (2) thereafter make markets consistent with the applicable quoting requirements specified in BX Options rules, on a continuous basis in at least sixty percent (60%) of the series in options in which the Market Maker is registered. Additionally, subsection 6(d)(i.1) indicates that to satisfy the Section 6(d)i. requirement with respect to quoting a series, a Market Maker must: (3) quote such series 90% of the trading day (as a percentage of the total number of minutes in such trading day) or such higher percentage as BX Options may announce in advance.[8] The Exchange does not propose to change any of the continuous quoting requirements applicable to a Market Maker (e.g., continuous quoting in 60% of the Market Maker's registered series for 90% of the trading day)[9] other than to eliminate the requirement to participate in the pre-opening phase in Section 6(d)i., which is noted in (1) above.

Subsequent to this proposal, a Market Maker will continue to have all of the other quoting obligations that the Market Maker now has pursuant to Section 6, and pursuant to Section 6(d)i., during regular market hours will be responsible to quote on a continuous basis in at least sixty percent (60%) of the series in options in which the Market Maker is registered for 90% of the trading day (as a percentage of the total number of minutes in such trading day). The change that the Exchange is proposing to Section 6(d)i. is removal of the Market Maker pre-opening quoting obligation and the insertion of text clarifying that the quoting obligation is during regular market hours.[10] As a result of the Exchange's proposed rule filing, the BX Options continuous quoting requirement on BX Options' electronic market makers will not have a pre-opening quoting obligation, just as other options exchanges (e.g., Phlx, ISE, and NOM) do not impose a pre-opening obligation on their electronic market makers.

Phlx, ISE, and NOM have a continuous quoting obligation during their regular market hours, which are similar to BX Options' market hours.[11] However, these exchanges do not have an obligation for their market makers to participate in a pre-opening phase. On Phlx, for example, a Remote Streaming Quote Trader (''RSQT''),[12] which is similar in nature to a BX Options Market Maker, has an obligation during trading hours to quote markets in not less than 60% of the series in which such RSQT is assigned (this is akin to BX Options Market Maker registration in a series). Unlike a BX Options Market Maker, which currently has a pre-opening obligation, a Phlx RSQT does not have a pre-opening market maker obligation.[13] As a second example, there is a quoting requirement for an ISE market maker. However, just like Phlx, and unlike BX Options, ISE does not have a pre-opening market maker obligation.[14] And as a further example, there is a quoting requirement for a NOM market maker. However, just like Phlx and ISE, and unlike BX Options, NOM does not have a pre-opening

[3] 17 CFR 240.19b–4(f)(6)(iii).

[4] A Market Maker is a BX Options participant that is registered with the Exchange as a Market Maker and has certain rights and bears certain responsibilities beyond those of other Options Participants. All Market Makers are designated as specialists on BX Options. *See* Chapter VII, Section 2.

[5] NASDAQ OMX PHLX LLC (''Phlx''), and International Securities Exchange, LLC (''ISE'') have market pre-opening phases. However, Phlx and ISE do not, as discussed in the proposal, impose pre-opening obligations on their respective options market makers; none of the exchanges require continuous quoting prior to the regular options trading market. Moreover, as discussed in the proposal, NOM has filed an immediately effective filing similarly eliminating pre-opening obligations on their options market makers. *See* Securities Exchange Act Release No. 67722 (August 23, 2012), 77 FR 52375 (August 29, 2012)(SR–NASDAQ–2012–095)(notice of filing and immediate effectiveness).

[6] *See* Securities Exchange Act Release No. 67722 (August 23, 2012), 77 FR 52375 (August 29, 2012) (SR–NASDAQ–2012–095) (notice of filing and immediate effectiveness).

[7] As a result, subsequent to this amendment NOM and BX Options Chapter VII, Section 6 will have exactly the same amended rule language.

[8] Subsection (6)(d)(i.2) establishes that three different types of option series are exempted from the continuous quote requirements: quarterly option series, adjusted option series, and series with an expiration of nine months or greater.

For continuous quotation requirements on BX Options generally, *see* Chapter XIV, Section 6(d).

[9] The BX Options trading day, which represents the regular market hours, is 9:30 a.m. to 4:00 p.m. Eastern Time, except for option contracts on fund shares or broad-based indexes which will close as of 4:15 p.m. Eastern Time. Chapter VI, Section 2. The regular market hours on Phlx, ISE, and NOM are similar to BX Options.

[10] Section 6(d)i. currently states, in relevant part:

i. On a daily basis, a Market Maker must participate in the pre-opening phase and thereafter make markets consistent with the applicable quoting requirements specified in these rules, on a continuous basis in at least sixty percent (60%) of the series in options in which the Market Maker is registered.

[11] *See* supra note 9.

[12] A Phlx RSQT is a Registered Options Trader that is a member or member organization with no physical trading floor presence that may generate and submit option quotations electronically in assigned options. *See* Phlx Rule 1014(b)(ii)(B). While the designation of RSQT does not exist on BX Options, a BX Options Market Maker enters quotes electronically on BX Options just as an RSQT does on Phlx pursuant to specific quoting obligations. *See* BX Options Chapter VII, Section 6(d) and Phlx Rule 1014(b)(ii)(D).

[13] For the Phlx continuous quoting rule, *see* Phlx Rule 1014(b)(ii)(D)(1).

[14] ISE rule 804(e)(2)(iii) states, in relevant part, that a Competitive Market Maker must maintain continuous quotations in an options class to which it is appointed and at least 60% of the series of the options class listed on the Exchange until the close of trading that day.

market maker obligation.[15] The proposed filing establishes that BX Options Market Makers, like Phlx, ISE, and NOM market makers, will not have a pre-opening quoting obligation prior to market open.[16]

Exchange Market Makers have noted that unlike BX Options, other options exchanges do not have a pre-opening quoting obligation for their market makers, and have requested the Exchange to eliminate the pre-opening obligation so that BX Options rules are similar to those of other options exchanges such as, for example, NOM and Phlx. This proposed rule change levels the playing field in respect of pre-opening obligations while leaving all other BX Options quoting requirements intact.[17]

Moreover, the Exchange believes that its proposal to put BX Options market makers in the same position as market makers on other exchanges will not have a negative effect on BX Options investors and traders (''BX Options participants''). In particular, the Exchange believes the removal of pre-opening market maker obligations on BX Options will have no impact on the functioning of the BX Options opening process and in turn will not negatively impact BX Options participants. The Exchange generally requires two other option markets to be open prior to BX Options initiating an opening process.[18] In addition, orders and quotes executed during the opening process on BX Options will continue to be protected by the National Best Bid or Offer (''NBBO''). As such, the Exchange believes that BX Options participants will continue to have a similar experience and quality of execution on the opening on BX Options as they do today.

The Exchange believes further that the proposed rule change eliminating pre-opening obligations should be pro-competitive in that it will attract more Market Makers, and additional liquidity, onto BX Options. This should be advantageous to traders and investors executing trading and hedging strategies on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[19] in general, and furthers the objectives of Section 6(b)(5) of the Act[20] in particular, in that the proposal is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes the proposal to conform Market Maker obligations to the requirements of competing markets will promote the application of consistent trading practices. Therefore, the Exchange believes the proposal promotes just and equitable principles of trade and serves to protect investors and the public interest.

Additionally, the Exchange believes the proposal removes a market maker quoting requirement that is unnecessary, as evidenced by the fact that it does not exist on other competitive markets. The Exchange operates in a highly competitive market comprised of ten U.S. options exchanges in which sophisticated and knowledgeable market participants can, and do, send order flow to competing exchanges if they deem trading practices at a particular exchange to be onerous or cumbersome. With this proposal, the Market Maker will be relieved of a market maker requirement that does not materially improve the quality of the markets. On the contrary, the pre-open phase obligation creates an additional obligation and burden on BX Options Market Makers that does not exist on numerous other competitive markets. The Exchange believes that in this competitive marketplace, the impact of the pre-open trading practice that exists on the Exchange today compels this proposal. It will allow Market Makers on the Exchange to follow rules that are similar to the rules of other options exchanges that do not impose pre-opening obligations on their market makers, and will allow Market Makers to focus on aspects of their operations that contribute to the market in a more efficient and meaningful way.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, BX Options' proposal to eliminate the pre-opening obligation on Market Makers is consistent with the market maker obligations on other options exchanges, which do not impose pre-opening obligations on market makers. The Exchange believes that its proposal is pro-competitive and should serve to attract market making activity and increase liquidity provision on BX Options.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and Rule 19b–4(f)(6) thereunder.[22]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[23] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[24] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will allow Market Makers on the Exchange to follow rules that are similar

[15] ISE rule 804(e)(2)(iii) states, in relevant part, that a Competitive Market Maker must maintain continuous quotations in an options class to which it is appointed and at least 60% of the series of the options class listed on the Exchange until the close of trading that day.

[16] The two-sided quote obligation is noted also in Chapter VII, Section 5(a)i., which states that during trading hours a Market Maker must maintain a two-sided market, pursuant to Section 6(d)i. of Chapter VII, in those options in which the Market Maker is registered to trade, in a manner that enhances the depth, liquidity and competitiveness of the market.

Recognizing the requirement to maintain a two-sided market during trading hours per Section 5(a)i., the Exchange is removing reference in Section 5(a)ii. to a Market Maker having to enter two-sided quotes before market open by participating in opening the market. This is done for purposes of conforming Section 5(a)ii. with proposed Section 6(d)i., which eliminates quoting obligations in the pre-opening phase before the market opens.

[17] Chapter VII, Section 6(d).

[18] For the BX Options opening process, *see* Chapter VI, Section 8; and for a description of the two options market opening process, *see http://www.nasdaqtrader.com/Content/TechnicalSupport/BXOptions_SystemSettings.pdf*.

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[23] 17 CFR 240.19b–4(f)(6).

[24] 17 CFR 240.19b–4(f)(6).

to the rules of other options exchanges that do not impose pre-opening obligations on their market makers. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–069 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2012–069. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2012–069 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26858 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68117; File No. SR–NYSEMKT–2012–51]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Sections 140 and 141 of the NYSE MKT LLC Company Guide To Amend Annual Fees and Certain Other Listing Fees Included Therein and To Make Technical and Conforming Changes

October 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on October 16, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain of the fees included in the NYSE MKT Company Guide and to make technical and conforming changes. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Sections 140 and 141 of its Company Guide to amend certain of the fees included therein and to make technical and conforming changes. The Exchange proposes to immediately reflect the proposed changes in the Company Guide, but not to implement the proposed changes until January 1, 2013.[3]

The Exchange proposes to amend Section 140 of its Company Guide, which provides for Original Listing Fees. The Exchange proposes to increase the Original Listing Fee charged in connection with the listing of new shares of common stock or common stock equivalents, including securities issued by non-U.S. companies, for issuers with outstanding shares in excess of 15,000,000. The Original Listing Fee for such issuers would increase from $70,000 to $75,000.

The Exchange also proposes to amend Section 141 of its Company Guide to increase its Annual Fees for stock issues as follows:

(i) for issuers with 50,000,000 shares outstanding or less, the Annual Fee would be increased by $2,500 (or 9.1%), from $27,500 to $30,000;

(ii) for issuers with 50,000,001 to 75,000,000 shares outstanding, the

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange has proposed changes to the Company Guide, as reflected in Exhibit 5 attached hereto, in a manner that would permit readers of the Company Guide to identify the changes that would be implemented on January 1, 2013.

Annual Fee would be increased by $3,500 (or 9.6%), from $36,500 to $40,000; and

(iii) for issuers with shares outstanding in excess of 75,000,000, the Annual Fee would be increased by $5,000 (or 12.5%), from $40,000 to $45,000.

The Exchange also proposes certain non-substantive changes. Specifically, the Exchange proposes to remove the asterisks and accompanying text that states that the Annual Fees are applicable as of January 1, 2010 because this text is obsolete and unnecessary.

The proposed changes to the Company Guide are intended to increase the overall revenue that the Exchange collects relating to listings from the issuers described above and to add clarity to the Company Guide. The Exchange's Original Listing Fees and Annual Fees have not been increased since 2009.[4] The increased revenue will help to offset the costs related to such listings and the resulting value that such listings provide to the issuers. The Exchange's costs related to listings include, but are not limited to, rulemaking initiatives, listing administration processes, issuer services, and administration of other regulatory functions related to listing. The proposed change is not otherwise intended to address any other problem, and the Exchange is not aware of any significant problem that the affected issuers would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.[7]

The Exchange believes that amending Section 140 of the Company Guide to increase the Original Listing Fee for issuers with outstanding shares in excess of 15,000,000 and amending Section 141 of the Company Guide to increase the Annual Fees is reasonable because the resulting fees would help to offset the Exchange's costs related to listings. The fee increases also would reflect the value that listings provide to the issuers, and the Exchange does not believe the increases to be material. In this regard, the Exchange notes that it has not recently increased these fees, but continually enhances and upgrades the level of service it provides in the listings area, including with respect to technology, compliance, and other regulatory matters related to listings.[8] The Exchange's costs with respect to listings include, but are not limited to, rulemaking initiatives, listing administration processes, issuer services, and administration of other regulatory functions related to listing. The Exchange believes that the proposed changes are reasonable because the increased fees would be used by the Exchange to offset, in part, these costs. As such, the Exchange believes that the proposed fee changes would have no negative impact on its ability to continue to adequately fund its regulatory program or the services the Exchange provides to issuers. In addition, the Exchange believes that the proposed fee increases are reasonable because the Exchange's Original Listing Fees and Annual Fees would still remain lower than a listing tier on at least one other exchange.[9]

The Exchange also believes that the proposed Original Listing Fee increase for issuers with outstanding shares in excess of 15,000,000 is equitable and not unfairly discriminatory because the Exchange wants to continue to incentivize small and large issuers that are qualified to list on the Exchange to do so, and not raising the Original Listing Fees for smaller issuers will help maintain that incentive, as such issuers generally are more cost-conscious. The Exchange does not believe the proposed increase in the Original Listing Fee for issuers with outstanding shares in excess of 15,000,000 will be a disincentive to list on the Exchange or unfairly discriminatory because it is the same as the entry fee charged by another national securities exchange for such issuers.[10] As such, this fee increase would allow the Exchange to remain competitive with other exchanges.

The Exchange believes that the proposed increases in Annual Fees also are equitably allocated and not unfairly discriminatory because all issuers will pay an increased amount in a narrow range of $2,500–$5,000 (or 9.1% to 12.5%) based on total shares outstanding.[11] By way of comparison, another exchange's last annual fee increase ranged from 0% to 16.7% across its various tiers based on total shares outstanding.[12] The Exchange believes that having slightly higher Annual Fee increases for issuers with more shares outstanding and a slightly higher fee increase in this instance is equitable and not unfairly discriminatory because such issuers generally have a larger number of shareholders that benefit from the liquidity and transparency that the continued listing offers.

The Exchange believes its tiered fee structure, with issuers with more total shares outstanding paying relatively higher Original Listing Fees and Annual Fees, is equitable and not unfairly discriminatory. Total shares outstanding provides a simple, objective, and efficient metric to take into account the relative size of issuers so that the Exchange can continue to incentivize listing by both large and small qualified companies; other exchanges also use such a metric.[13] Total shares outstanding also is a metric within each issuer's control that provides predictability with respect to fees and does not subject such fees to the volatility of the market or other market or general economic events outside the issuer's control (e.g., the average number of shares traded per day).

The Exchange further notes that it operates in a highly competitive market in which issuers can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and services to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed

[4] *See* Securities Exchange Act Release No. 59560 (Mar. 11, 2009), 74 FR 11392 (Mar. 17, 2009) (SR–NYSEALTR–2009–02).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] The Commission notes that Section 6(b)(5) of the Act contains the provision that states rules of an exchange ''are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.'' *See* 15 U.S.C. 78f(b)(5).

[8] *See supra* note 4.

[9] For example, the entry fees for NASDAQ Global Market range from $125,000 to $225,000, and the annual fees range from $35,000 to $99,500. *See* NASDAQ Rules 5910(a)(1) and 5910(c)(1).

[10] *See* NASDAQ Rule 5920(a)(1). NASDAQ and other exchanges also have differential entry fees based on total shares outstanding. For example, the listing fees for the New York Stock Exchange LLC (''NYSE'') increase as the total number of shares outstanding at time of listing increases. *See* NYSE Listed Company Manual, Section 902.03.

[11] Like NYSE MKT, other exchanges also have differential annual fees based on shares outstanding. *See* NASDAQ Rule 5910(c); NYSE Listed Company Manual, Section 902.03; and NYSE Arca Equities, Inc. Schedule of Fees and Charges for Exchange Services, *available at www.nyse.com/pdfs/NYSEArca_Listing_Fees.pdf.*

[12] *See* Securities Exchange Act Release No. 61669 (Mar. 5, 2010), 75 FR 11958 (Mar. 12, 2010) (SR–NASDAQ–2009–081). The Exchange further notes that NASDAQ Rules 5910(c)(2), 5910(d)(5), and 5920(c)(4) provide NASDAQ with the discretion to waive all or part of the annual listing fees.

[13] *See supra* notes 10 and 11.

rule change reflects this competitive environment.

Additionally, the Exchange believes that the non-substantive changes that are proposed, which are technical and conforming changes, are reasonable because they will result in the removal of unnecessary and obsolete text from the Company Guide. These changes are also equitable and not unfairly discriminatory because they will benefit all issuers and all other readers of the Company Guide.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [14] of the Act and subparagraph (f)(2) of Rule 19b–4 [15] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE MKT.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–51 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2012–51. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–51 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26859 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68119; File No. SR–ICEEU–2012–08)]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change To Clear Western European Sovereign CDS Contracts

October 29, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2012, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to provide for the clearing of Western European Sovereign CDS contracts in connection with Paragraph 13 of ICE Clear Europe's CDS Procedures on the following sovereign reference entities: Republic of Ireland, Italian Republic, Hellenic Republic, Portuguese Republic, and Kingdom of Spain (the ''New Sovereign Contracts'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of these statements.[3]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

ICE Clear Europe has identified Western European Sovereign CDS

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by ICE Clear Europe.

Contracts as a product that has become increasingly important for market participants to manage risk and express views with respect to the European sovereign credit markets. ICE Clear Europe believes clearance of the New Sovereign Contracts will facilitate the prompt and accurate settlement of swaps and contribute to the safeguarding of securities and funds associated with swap transactions. The terms of the New Sovereign Contracts will be governed by Paragraph 13 of the CDS Procedures. Clearing of the New Sovereign Contracts will not require any changes to ICE Clear Europe's existing Rules and Procedures.

ICE Clear Europe's risk management framework has several features designed to address particular risks of the New Sovereign Contracts. To address so-called ''wrong way risk'' involving correlation between the risk of default of an underlying sovereign and the risk of default of a clearing member that has written credit protection on such a sovereign, the New Sovereign Contracts are denominated in U.S. dollars, rather than Euro (and related margin and guaranty fund requirements are denominated in U.S. dollars). In addition, the rules contain limitations on self-referencing trades (i.e., trades where the clearing member is an affiliate of the underlying sovereign reference entity). Such trades may not be submitted for clearing, and if a clearing member subsequently becomes affiliated with the underlying reference entity, the rules applicable to New Sovereign Contracts provide for the termination of relevant positions.

The margin model applicable to New Sovereign Contracts will use a combination of ICE Clear Europe's spread risk margin calculation methodology used for other CDS trades and a separate margin calculation using a Monte Carlo simulation. The initial margin requirement will reflect the higher of the two calculations.[4]

ICE Clear Europe believes that the proposed rule change to add New Sovereign Contracts for clearing are consistent with the requirements of Section 17A of the Act and the CDS procedures and regulations thereunder applicable to it.

B. Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule change would have any impact, or impose any burden, on competition.

[4] ICE Clear Europe has performed a variety of empirical analyses related to clearing of the New Sovereign Contracts under its margin methodology, including back tests and stress tests.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, CDS Clearing Members or Others

Written comments relating to the proposed rule change have not been solicited or received. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. In addition, the Commission seeks comment generally on the following issues.

(1) What would be the effect on the promotion of efficiency, competition, and capital formation of ICE Clear Europe clearing New Sovereign Contracts?

(2) Would the clearing of New Sovereign Contracts create incentives among market participants to initiate trades that they otherwise would not? If so, would this increase or create new risks to the financial system or to the central counterparty that would offset the potential benefits of centralized clearing of New Sovereign Contracts?

(3) Would ICE Clear Europe's risk management framework, as described above, appropriately address risks arising from ICE Clear Europe's clearing of New Sovereign Contracts, including but not limited to ''wrong-way risk''?

(4) Is the information set forth in this notice or otherwise available to the public sufficient to allow the public to provide meaningful comment on the proposed rule change?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2012–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICEEU–2012–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's Web site at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2012–08 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Elizabeth M. Murphy,

Secretary.

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[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68121; File No. SR–CME–2012–26]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing of Proposed Rule Change To Amend Rules in Connection With Status as a ''Deemed Registered'' Clearing Agency

October 29, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2012, Chicago Mercantile Exchange, Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by CME. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME is proposing to amend certain rules in connection with its status as a ''deemed registered'' clearing agency for purposes of clearing security-based swap products. The proposed changes are designed to comply with certain requirements in the Act. The text of the proposed changes is available on the CME's Web site at *http://www.cmegroup.com,* at the principal office of CME, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[3]

[1] 15 U.S.C. 78s(b)(2).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by CME.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Background—CME's Credit Default Swap Business and ''Deemed Registered'' Status

CME began clearing credit default swaps prior to the passage of the Dodd-Frank Act. These activities were facilitated by temporary exemptive relief granted by the Commission to CME. This temporary exemptive relief expired on July 16, 2011. At that time, certain provisions in the Dodd-Frank Act became effective that were intended to ensure that derivatives clearing organizations such as CME that were clearing credit default swaps prior to the passage of Dodd-Frank based on exemptions granted by the Commission could continue to do so without interruption. These provisions provided that CME became ''deemed registered'' as a clearing agency solely for the limited purpose of clearing security-based swaps. Commission staff has interpreted this Dodd-Frank ''deemed registered'' provision to mean that CME Inc., the legal entity that houses all of CME's futures and swap businesses, is generally subject to all of the requirements of the Act that apply to clearing agencies, including the obligation to submit rule filings of CME Inc. under SEC Rule 19b–4.

To-date, CME has not offered any products for clearing that fall under the Commission's jurisdiction since the passage of the Dodd-Frank Act.[4] CME has made over sixty rule filings under Rule 19b-4 since Dodd-Frank became effective, certain of which relate to CME's current broad-based credit default swap clearing business. CME is currently seeking approval from the Commission to offer single name credit default swaps for clearing; however, to date, CME has not received approval to do so.

Summary of Proposed Rule Changes

Commission staff has reviewed CME's rulebook and requested that CME make certain changes in accordance with existing Commission interpretive guidance.[5] The changes that are included in this filing are intended to address these requests. The proposed rule changes are found within Chapter 8H of the CME rulebook. The changes can be summarized as follows:

Changes to Rule 8H04: The changes to Rule 8H04, which sets forth CDS Clearing Member obligations and qualifications, are intended to address Section 17A(b)(3)(B) of the Exchange Act. The proposed changes explain that CME may approve an application for CDS Clearing Membership to permit the clearing of security-based swaps submitted by any corporation, partnership, limited liability company, or any other type of entity, provided that it determines such applicant satisfies applicable requirements and that applicants within one of the enumerated categories of participants in Section 17A(b)(3)(B) of the Securities Act of 1934 are specifically eligible to become CDS Clearing Members for the purpose of clearing security-based swaps. Further, separate revisions to Rule 8H04 are proposed that would make clear that CME may deny an application for CDS clearing membership to any person subject to a statutory disqualification as such term is defined by the Act.

Change to 8H07 and 8H802.B: The proposed changes to Rule 8H07, which governs CDS financial safeguards and guaranty fund deposit matters, would require CME to notify clearing members regarding both the amount of and reasons for any charges to the guaranty fund for any reason other than to satisfy a clearing loss attributable to a clearing member solely from that clearing member's guaranty fund deposit. Other proposed changes to Rule 8H802.B would specify that CME would provide notice to CDS Clearing Members as required by the Act regarding any amounts charged to the CDS Guaranty Fund due to losses incurred. Finally, proposed changes would also clarify that CME would apply Rule 8H07 on a uniform and non-discriminatory basis when determining minimum guaranty fund deposits.

Change to 8H930. One proposed change to Rule 8H930 highlights the fact that CME will apply Rule 8H930 on a uniform and non-discriminatory basis when determining performance bond requirements. Additional new language will also explain that (i) Acceptable performance bond assets for security-based swaps and the applicable haircuts related to such assets will be set forth on a public Web site and that CME will have discretion to make adjustments to asset haircuts at any time; (ii) any such adjustment to the applicable asset haircut will be promptly communicated to CDS Clearing Members; (iii) any

[4] CME currently offers clearing for certain credit default swap index products based on broad based indices that are under the exclusive jurisdiction of the Commodity Futures Trading Commission. More specifically, CME currently clears Markit CDX North American Investment Grade Index Series 8, 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19 and for Markit CDX North American High Yield Index Series 11, 12, 13, 14, 15, 16, 17, 18 and 19.

[5] *See* Regulation of Clearing Agencies, Exchange Act Release No. 16900 (Jun. 17, 1980).

adjustments to the applicable asset haircut schedule for security based swap clearing activities must be based on an analysis of appropriate factors including, for example, historical and implied price volatilities, market composition, current and anticipated market conditions, and other relevant information; and (iv) the Clearing House will conduct regular reviews of its then-current haircut schedules and make any necessary adjustments.

New Rule 8H820. New rule 8H820 will specify that performance bond requirements will be as determined by CME staff from time to time and as set forth in Rule 820. With respect to performance bond requirements that apply to security-based swap clearing activities, CME will be required under Rule 8H20 to determine that each item that is enumerated as being acceptable performance bond pursuant to CME Rule 820 has been determined to assure the safety and liquidity of the Clearing House as is required by Section 17A(b)(3)(F) of the Act.

New Rule 8H931. New Rule 8H931 would be added. This Rule would state that rules that relate to CME's activities as a clearing agency clearing security-based swaps will be adopted, altered, amended or repealed in accordance with the applicable requirements of Section 19(b) of the Act. Under the Rule, CME would promptly notify all CDS Clearing Members of any proposal it has made to change, revise, add or repeal any rule that relates to its activities as a securities clearing agency. Such notice would have to include the text or a brief description of any such proposed rule change, along with its purpose and effect, in accordance with the requirements of the Act. CDS Clearing Members would be required to submit comments with respect to any such proposal in accordance with the applicable SEC rules.

New Rule 8H932. New Rule 8H932 will require CME to maintain records of any disciplinary proceeding related to the activities of a CDS Clearing Member involving security-based swaps in accordance with the requirements of the Act and Rule 17a-1 thereunder.

New Rule 8H933. New Rule 8H933 would add rule language to Chapter 8H that would require CME to notify the Commission and any appropriate regulatory agency, as such term is defined by Section 3(a)(34) of the Act, regarding any final disciplinary sanction, denial of participation, prohibition or limitation with respect to access and/or summary suspension taken against a CDS Clearing Member relating to activities involving security-based swaps.

New Rule 8H934. New Rule 8H934 would obligate CME to, as soon as practicable after the end of each calendar year, make available financial statements audited by independent public accountants to all CDS Clearing Members engaged in security-based swap clearing activities. CME would also be required under this rule to make available to CDS Clearing Members clearing security-based swaps a report by independent public accountants regarding CME Group's system of internal accounting control, describing any material weaknesses discovered and any corrective action taken or proposed to be taken.

The financial statements would, at a minimum include: (i) The balance of the clearing fund and the breakdown of the fund balance between the various forms of contributions to the fund, e.g., cash and secured open account indebtedness; (ii) the types and amounts of investments made with respect to the cash balance; (iii) the amounts charged to the clearing fund during the year in excess of a defaulting clearing member's Guaranty Fund contribution; and (iv) any other charges to the fund during the year not directly related and chargeable to a specific clearing member's Guaranty Fund contribution. CME also would make available to CDS Clearing Members clearing security-based swaps a report of CME Group Inc. by independent public accountant regarding its system of internal accounting control, describing any material weaknesses discovered and any corrective action taken or proposed to be taken.

CME would also furnish to all CDS Clearing Members engaged in security-based swap clearing activities, within 40 days following the close of each fiscal quarter, unaudited quarterly financial statements. These unaudited quarterly financial statements shall at a minimum consist of: (i) A statement of financial position as of the end of the most recent fiscal quarter and as of the end of the corresponding period of the preceding fiscal year; (ii) a statement of changes in financial position for the period between the end of the last fiscal year and the end of the most recent fiscal quarter and for the corresponding period of the preceding fiscal year; and (iii) a statement of results of operations, which may be condensed, for the most recent fiscal quarter and for the period between the end of the last fiscal year and the end of the most recent fiscal quarter and for the corresponding periods of the preceding fiscal year.

New Rule 8H935. New Rule 8H935 would limit CME's ability to invest the cash portion of the CDS Guaranty Fund and CDS Clearing Member performance bond contributions by only allowing investments in accordance with the requirements of CFTC Regulation 1.25, including U.S. Government obligations or such other investments as the rules of CME may provide which assure safety and liquidity. CME would also be required to limit its use of CDS Guaranty Fund and performance bond contributions related to security based swap activities to the purposes permitted by the Act under the proposed rule language.

New Rule 8H936. New Rule 8H935 would specify that CME would perform periodic risk assessments of CME's operations and its data processing systems and facilities, and provide CME's Board with such reports, and supervise the establishment, maintenance, and updating of operations and data processing safeguards while reporting periodically to the Board concerning strengths and weaknesses in CME's system of safeguards. In addition, the new Rule would make clear that CME was obligated to consider the impact that new or expanded service or volume increases would have on CME's processing capacity, both physical, including personnel, and systemic risk.

New Rule 8H938. Under new Rule 8H938, CME would only summarily suspend and close the accounts of a CDS Clearing Member engaged in security-based swap clearing activities that (i) has been and is expelled or suspended from any self-regulatory organization, (ii) is in default of any delivery of funds or securities to the clearing agency, or (iii) is in such financial operating difficulty that the clearing agency determines and so notifies the appropriate regulatory agency for the member that such suspension and closing of accounts are necessary for the protection of the clearing agency, its members, creditors, or investors.

Fair Representation Requirement

Commission staff has asked CME to provide an explanation of how CME's current governance arrangements relating to its CDS clearing offering should be viewed in light of the requirements of Section 17A(b)(3)(C) of the Act. This provision requires that the rules of a clearing agency assure a ''fair representation'' of its participants in the selection of its directors and administration of its affairs.

As an initial matter, CME notes that the Board of Directors of the CME Group Inc., the parent of CME, also serves as the Board of the CME. CME Group is a public company whose stock is listed on

the Nasdaq Stock Market (''Nasdaq'') and thus is subject to board composition requirements under Nasdaq listing standards. In addition, any member of the public is afforded the opportunity to purchase shares in the CME Group and influence the selection of directors and administration of its affairs on that basis, subject to applicable law.[6]

CME is also subject to governance and conflict of interest provisions under the core principles set out in the Commodity Exchange Act (''CEA'') for a derivatives clearing organization (''DCO''). The CFTC reviews CME for compliance with these principles. For example, Section 5b(c)(2)(O) of the CEA sets out governance fitness standards that apply to DCOs, including transparent governance arrangements, that are designed to ensure the consideration of views of owners and participants. Further, Section 5b(c)(2)(Q) of the CEA requires a DCO's board to include market participants. CFTC regulations also require a DCO's governance arrangements to be clear and transparent and ''to support the objectives of relevant stakeholders''.

CME also believes it is relevant that CDS participants will have a meaningful input into decisions affecting the clearing operations for CDS through participation on the CME CDS Risk Committee. Under CME Rule 8H27, the CDS Risk Committee was formed to provide guidance and oversight to CME Clearing on matters relating to CDS Products. The CDS Risk Committee, among other things, is responsible for reviewing CDS financial safeguards, and CDS clearing member requirements, risk management policies and practices, review of CDS rule changes, etc.

The Charter of the CDS Risk Committee sets forth certain composition requirements that ensure the perspectives of CDS Clearing Members are represented. More specifically, the Charter requires that at all times the CDS Risk Committee is populated with up to nine and no fewer than five individuals who are representative of CDS Clearing Members. Because of these composition requirements of the CDS Risk Committee, and the scope of its responsibilities, CME believes the Commission could find that its current governance arrangements meet the requirements of the Act.

[6] As noted in a 1980 SEC Release providing staff guidance regarding the requirements of Section 17A of the Act (Securities Exchange Act of 1934, Release No. 16900, June 17, 1980), the SEC may find ''fair representation'' with respect to clearing agency participants if such participants are afforded an opportunity to acquire voting stock of the clearing agency in proportion to their use of its facilities.

Further, CME also notes that the Charter of the CDS Risk Committee specifically provides that its Chairman shall be a member of the CME Inc. Board of Directors. In this capacity, the Chairman of the CDS Risk Committee serves as a liason to the full board of directors of CME. He or she can relay any concerns addressed by the CDS Risk Committee to the full CME Board. CME notes that the CDS Risk Committee is required to reassess the adequacy of this Charter on an annual basis and submit any recommended changes to the full CME Board for approval. CME believes these features provide a concrete nexus between the activities of the CDS Risk Committee and the full CME Board and ensure that there will be a ''fair representation'' of CDS Clearing Members in accordance with the spirit and letter of the Act.

The CME believes the proposed rule changes are consistent with the requirements of the Act, including Section 17A of the Act. The changes are specifically designed to meet Section 17A requirements as interpreted by Commission staff for clearing agencies.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has presented these proposed changes to the representatives of its CDS Risk Committee. CME has not otherwise solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CME–2012–42 on the subject line.

Paper Comments

Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CME–2012–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on the CME's Web site at *http://www.cmegroup.com.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CME–2012–26 and should be submitted on or before November 23, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26861 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13348 and #13349]

Massachusetts Disaster # MA–00049

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the Commonwealth of Massachusetts dated 10/22/2012.

Incident: Severe Storms and Flooding.

Incident Period: 09/05/2012.

Effective Date: 10/22/2012.

Physical Loan Application Deadline Date: 12/21/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 07/22/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Bristol.

Contiguous Counties:

Massachusetts: Norfolk.

Rhode Island: Plymouth/Newport, Bristol, Providence.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.375
Homeowners Without Credit Available Elsewhere	1.688
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 13348 6 and for economic injury is 13349 0.

The States which received an EIDL Declaration # are Massachusetts, Rhode Island.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: October 22, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–26846 Filed 11–1–12; 8:45 am]

BILLING CODE 8025–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Actions Taken at September 20, 2012, Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: As part of its regular business meeting held on September 20, 2012, in Harrisburg, Pennsylvania, the Commission took the following actions: approved or tabled the applications of certain water resources projects; and took additional actions, as set forth in the Supplementary Information below.

DATES: September 20, 2012

ADDRESSES: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436; email: *rcairo@srbc.net.* Regular mail inquiries may be sent to the above address. See also Commission Web site at *www.srbc.net.*

SUPPLEMENTARY INFORMATION: In addition to its related actions on projects identified in the summary above and the listings below, the following items were also presented or acted on at the business meeting: (1) Approved/ratified grants involving the Chesapeake Bay Nutrient Monitoring Program, the development of Total Maximum Daily Loads (TMDLs) studies, and the Public Water System Assistance Initiative Project with the PA Dept. of Environmental Protection; (2) amended the Water Quality Protection and Pollution Prevention Grant (known as the 106 grant); (3) authorized expansion of the SRBC Remote Water Quality Monitoring Network; (4) approved two listing agreements with Latus Commercial Realty for sale of the current headquarters building and leasing of space in the new headquarters building now under construction; (5) approved the partial waiver of application fees when a project sponsor withdraws an application prior to SRBC beginning its technical review; (6) approved a request by Talon Holdings, LLC for a conditional transfer extension related to the Hawk Valley Golf Course, Lancaster County, Pa.; and (7) approved issuance of a corrective docket to Nature's Way Purewater Systems, Inc. to correct an error misidentifying a project feature for which monitoring is required.

Project Applications Approved

The Commission approved the following project applications:

1. Project Sponsor and Facility: Borough of Adamstown, Adamstown Borough, Lancaster County, Pa. Renewal of groundwater withdrawal of up to 0.069 mgd (30-day average) from Well 4 (Docket No. 19801104).

2. Project Sponsor and Facility: Anadarko E&P Company LP (Second Fork Larrys Creek), Mifflin Township, Lycoming County, Pa. Surface water withdrawal of up to 0.200 mgd (peak day).

3. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Susquehanna River), Susquehanna Depot Borough, Susquehanna County, Pa. Renewal of surface water withdrawal of up to 1.500 mgd (peak day) (Docket No. 20080908).

4. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Susquehanna River), Great Bend Township, Susquehanna County, Pa. Renewal of surface water withdrawal of up to 2.000 mgd (peak day) (Docket No. 20080905).

5. Project Sponsor and Facility: Carrizo (Marcellus), LLC (Muddy Run), Gulich Township, Clearfield County, Pa. Surface water withdrawal of up to 0.720 mgd (peak day).

6. Project Sponsor and Facility: East Hempfield Township Municipal Authority, East Hempfield Township, Lancaster County, Pa. Surface water withdrawal of up to 0.070 mgd (30-day average) from S–1 (Baker Spring); and Groundwater withdrawal of up to 0.268 mgd (30-day average) from Well W–1, 0.673 mgd (30-day average) from Well W–2, 0.264 mgd (30-day average) from Well W–3, 0.321 mgd (30-day average)

[7] 17 CFR 200.30–3(a)(12).

from Well W–4, and renewal of groundwater withdrawal of up to 0.632 mgd (30-day average) from Well W–5 (Docket No. 19810203).

7. Project Sponsor and Facility: Enerplus Resources (USA) Corporation (West Branch Susquehanna River), East Keating Township, Clinton County, Pa. Surface water withdrawal of up to 2.000 mgd (peak day).

8. Project Sponsor and Facility: EXCO Resources (PA), LLC (Larrys Creek), Mifflin Township, Lycoming County, Pa. Renewal of surface water withdrawal with modification, for a total of 0.200 mgd (peak day) (Docket No. 20080936).

9. Project Sponsor and Facility: Forest Springs Water Company, Wayne Township, Schuylkill County, Pa. Groundwater withdrawal of up to 0.075 mgd (30-day average) from Borehole BH–1, and modification to consumptive water use approval removing previous sources Spring 1 and Spring 2 and adding new source Borehole BH–1 (Docket No. 20010206).

10. Project Sponsor: Hydro Recovery-Antrim LP. Project Facility: Antrim Treatment Plant, Duncan Township, Tioga County, Pa. Modification to project features and to increase surface water withdrawal by an additional 1.152 mgd, for a total of 1.872 mgd (peak day) (Docket No. 20090902).

11. Project Sponsor and Facility: Keystone Clearwater Solutions, LLC (Lycoming Creek), Lewis Township, Lycoming County, Pa. Modification to increase surface water withdrawal, for a total of 2.125 mgd (peak day) (Docket No. 20110616).

12. Project Sponsor and Facility: Keystone Clearwater Solutions, LLC (Moshannon Creek), Snow Shoe Township, Centre County, Pa. Renewal of surface water withdrawal of up to 1.000 mgd (peak day) (Docket No. 20080946).

13. Project Sponsor and Facility: Keystone Clearwater Solutions, LLC (West Branch Susquehanna River), Goshen Township, Clearfield County, Pa. Renewal of surface water withdrawal of up to 1.000 mgd (peak day) (Docket No. 20080944).

14. Project Sponsor and Facility: Roaring Spring Water—Division of Roaring Spring Blank Book, Roaring Spring Borough, Blair County, Pa. Modification to increase consumptive water use by an additional 0.125 mgd, for a total of 0.255 mgd (peak day) (Docket No. 20120309), and to increase surface water withdrawal by an additional 0.131 mgd, for a total of 0.302 mgd (peak day) (Docket No. 20120309).

15. Project Sponsor and Facility: Talisman Energy USA Inc. (Susquehanna River), Sheshequin Township, Bradford County, Pa. Renewal of surface water withdrawal of up to 1.500 mgd (peak day) (Docket No. 20080909).

Project Applications Tabled

The following project applications were tabled by the Commission:

1. Project Sponsor and Facility: Caernarvon Township Authority, Caernarvon Township, Berks County, Pa. Application for renewal of groundwater withdrawal of up to 0.035 mgd (30-day average) from Well 6 (Docket No. 19820912).

2. Project Sponsor and Facility: EQT Production Company (Pine Creek), Porter Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.000 mgd (peak day).

3. Project Sponsor and Facility: Falling Springs Water Works, Inc. (Falling Springs Reservoir), Ransom Township, Lackawanna County, Pa. Application for surface water withdrawal of up to 0.800 mgd (peak day).

4. Project Sponsor and Facility: Gaberseck Brothers (Odin Pond 2), Keating Township, Potter County, Pa. Application for surface water withdrawal of up to 0.249 mgd (peak day).

5. Project Sponsor and Facility: Houtzdale Municipal Authority (Beccaria Springs), Gulich Township, Clearfield County, Pa. Application for surface water withdrawal of up to 10.000 mgd (peak day).

6. Project Sponsor and Facility: Southwestern Energy Production Company (Middle Lake), New Milford Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.720 mgd (peak day).

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: October 19, 2012.

Thomas W. Beauduy,

Deputy Executive Director.

[FR Doc. 2012–26877 Filed 11–1–12; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on the Tappan Zee Hudson River Crossing Project in New York

Correction

In notice document 2012–26799, appearing on page 65929 in the issue of Wednesday, October 31, 2012, make the following correction:

On page 65929, in the first column, under the **DATES** heading, in the seventh line, ''[Insert date 150 days after publication in the **Federal Register**]'' should read ''March 30, 2013''.

[FR Doc. C1–2012–26799 Filed 11–1–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Limitation of Claims Notice for Judicial Review of Actions by FHWA and Other Federal Agencies in the City of Cincinnati, Hamilton County, OH and the City of Covington, Kenton County, KY

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other federal agencies.

SUMMARY: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). The actions relate to a proposed project to improve the Brent Spence Bridge over the Ohio River, as well as improvements to Interstate Routes 71 and 75 and interchanges in the City of Cincinnati, Hamilton County, State of Ohio and City of Covington, Kenton County, Commonwealth of Kentucky, including a new bridge over the Ohio River. This notice covers those Federal agency actions to grant licenses, permits, and approvals for the project.

DATES: A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 1, 2013. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Noel F. Mehlo Jr., Environmental Program Manager, Federal Highway Administration, 200 North High Street, Room 328, Columbus, Ohio 43215, Telephone: (614) 280–6896; or Stefan Spinosa, PE, Ohio Department of Transportation (ODOT), 505 South State Route 741, Lebanon, Ohio 45036, Telephone: (513) 933–6639.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies including, but not limited to; the United States Coast Guard, United States Army Corps of Engineers, United States Fish and Wildlife Service, Advisory Council on

Historic Preservation, and USEPA have taken final agency actions by issuing licenses, permits, and approvals for the following major highway improvements in the State of Ohio and the Commonwealth of Kentucky. The project will involve: construction of a new Ohio River Bridge; an addition of one lane in each direction on I–75 from the Western Hills Viaduct interchange in Cincinnati to the Dixie Highway interchange in Kentucky, including auxiliary lanes and collector-distributor systems where required at each interchange within the project area. The overall project length is approximately 7.8 miles along I–75. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the FHWA administrative record for the Environmental Assessment (EA) for the project and included in the Finding of No Significant Impact (FONSI) issued on August 9, 2012. The EA, FONSI, and other documents in the FHWA administrative record file are available by contacting the FHWA or ODOT at the addresses provided above. Pertinent project files may also be accessed through the ODOT project Web site at: *http://www.brentspencebridgecorridor.com/.* This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319.

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604; Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6); Rivers and Harbors Act of 1899, 33 U.S.C. 401–406; Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287; Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931; TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11); Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

Catalog of Federal Domestic Assistance Number and Title: FHWA 20.205 Highway Planning and Construction (A, B). The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Authority: 23 U.S.C. 139(l)(1).

Issued on: October 23, 2012.

Robert L. Griffith,

Acting Division Administrator, Federal Highway Administration, Columbus, Ohio.

[FR Doc. 2012–26874 Filed 11–1–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35679]

Union Railroad Company—Corporate Family Merger Exemption—McKeesport Connecting Railroad Company

Union Railroad Company (URR) and McKeesport Connecting Railroad Company (MCK) (collectively, applicants) have jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a corporate family transaction pursuant to which MCK would be merged into URR.

URR and MCK are both Delaware corporations and Class III rail carriers. United States Steel Corporation (USS), a noncarrier, owns all of the issued and outstanding stock of Transtar, Inc. (Transtar), a noncarrier holding company, which owns all of the issued and outstanding stock of six Class III rail carriers (collectively, the Transtar railroads), including URR and MCK.

URR is a switching and terminal railroad that operates approximately 27.8 route miles, extending from an interchange with the Bessemer & Lake Erie Railroad at North Bessemer, PA, south to an interchange with Wheeling & Lake Erie Railway at Mifflin Junction, PA, with branches to Clairton, South Duquesne and Munhall, PA. URR connects at the intermediate point of Bessemer, PA, with CSX Transportation, Inc. (CSXT) and at Kenny and Clarion, PA, with Norfolk Southern Railway. MCK is a switching and terminal railroad that operates at McKeesport, PA. It connects with CSXT and serves USS' McKeesport Tubular Operations.

Applicants state that, pursuant to the provisions of a Plan of Merger executed by the parties, MCK will be merged into URR upon the effective date of the merger, with URR as the surviving corporation. According to applicants, the corporate existence of the surviving corporation will continue unimpaired and unaffected by the merger.

Unless stayed, the exemption will be effective on November 18, 2012. Applicants state that the merger of MCK into URR is expected to become effective as of January 1, 2013, and that the transaction will be consummated as of that date.

According to applicants, the purpose of the corporate transaction is to simplify the corporate structure of the Transtar railroads by reducing the number of subsidiary railroads controlled by Transtar to five which will reduce the administrative, accounting, reporting, and related burdens associated with the maintenance of the two separate corporate entities.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). Applicants state that the transaction will not result in adverse changes in service levels, significant operational changes, or any changes in the competitive balance with carriers outside the corporate family. Applicants further state that the service presently provided by the involved carriers will be continued by URR and all current connections of the involved carriers will be continued.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III rail carriers.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than November 9, 2012 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35679, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on John A. Vuono, Vuono & Gray, LLC, 310 Grant Street, Suite 2310, Pittsburgh, PA 15219.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: October 29, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–26880 Filed 11–1–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35667]

Arkansas-Oklahoma Railroad, Inc.—Lease and Operation Exemption—Lines of Union Pacific Railroad Company

Under 49 CFR 1011.7(a)(2)(x)(A), the Director of the Office of Proceedings (Director) is delegated the authority to determine whether to issue notices of exemption under 49 U.S.C. 10502 for lease and operation transactions under 49 U.S.C. 10902. However, the Board reserves to itself the consideration and disposition of all matters involving issues of general transportation importance. 49 CFR 1011.2(a)(6). Accordingly, the Board revokes the delegation to the Director with respect to issuance of the notice of exemption for lease and operation of the rail lines at issue in this case. The Board determines that this notice of exemption should be issued, and does so here.

According to Arkansas-Oklahoma Railroad, Inc. (AOK), a Class III rail carrier, AOK and Union Pacific Railroad Company (UP) have entered into a new Lease Agreement (Agreement). AOK has filed a verified notice of exemption under 49 CFR 1150.41 [1] to continue to lease from UP and to operate approximately 12.58 miles of UP's rail lines between (1) milepost 364.96 and milepost 370.5 on UP's Shawnee Branch at or near McAlester, a distance of approximately 5.54 miles, and (2) the Krebs Industrial Lead from the clearance point of the mainline switch on UP's Cherokee Subdivision at milepost 0.0 in McAlester to the end of the track at milepost 7.04 in Krebs, a distance of approximately 7.04 miles, both lines in Pittsburg County, Okla.[2] AOK will continue to operate the lines as part of its existing rail line between McAlester and Howe, Okla.

Pursuant to 49 CFR 1150.43(h), AOK states that, although the Agreement contains no direct restrictions on interchange, the lease fee is based upon the percentage of traffic AOK interchanges with UP. AOK states that this arrangement is unchanged from the original lease agreement covering the lines.[3]

AOK certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed $5 million.

AOK states that consummation of the transaction will occur on or about November 19, 2012. The earliest the transaction can be consummated is November 18, 2012, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than November 9, 2012 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35667, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Daniel A. LaKemper, General Counsel, Arkansas-Oklahoma Railroad, Inc., P.O. Box 185, Morton, IL 61550.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

It is ordered:

1. The delegation of authority to the Director of the Office of Proceedings under 49 CFR 1011.7(a)(2)(x)(A) to determine whether to issue a notice of exemption in this proceeding is revoked.

2. Notice of the exemption will be published in the **Federal Register** on November 2, 2012.

3. This decision is effective on the date of service.

Decided: October 29, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey dissented with a separate expression.

Vice Chairman Mulvey, dissenting.

According to AOK's notice, AOK has been leasing a line of railroad from UP since 1997 under an agreement that gives AOK a financial incentive to interchange its traffic with UP, rather than with Kansas City Southern (KCS). The shippers whose traffic was subject to the interchange commitment contained in the 1997 lease may or may not have been aware of it, given that the notice authorizing that lease made no mention of the presence of a special lease fee arrangement. *See Arkansas-Oklahoma R.R.—Trackage Rights Exemption—Union Pac. R.R.,* FD 33440 (STB served Aug. 15, 1997). Since that 1997 notice was filed, the Board has changed its rules to require the public disclosure of interchange commitments and the filing of a complete version of the agreement with the Board (under seal). *See* 49 CFR 1150.43.[1]

In support of its desire to continue a lease credit arrangement encouraging interchange with UP rather than KCS—one that has already been in place for more than 15 years—AOK argues that the interchange commitment does not materially change its interchange practices. That argument, of course, begs the question as to why such a provision

[1] AOK originally filed its verified notice of exemption on September 25, 2012. On October 19, 2012, it filed an amended verified notice. Accordingly, October 19, 2012, will be considered the filing date of the verified notice.

[2] AOK previously obtained an exemption in 1997 to lease and operate the rail lines. *See Arkansas-Oklahoma R.R.—Trackage Rights Exemption—Union Pac. R.R.,* FD 33440 (STB served Aug. 15, 1997).

[3] Concurrently with its verified notice of exemption, AOK has filed under seal, pursuant to 49 CFR 1150.43(h)(1)(ii), a confidential, complete version of the Agreement.

[1] I note that AOK's initial notice did not contain the information required under the Board's current rules. AOK subsequently amended its notice.

is necessary at all. Presumably, sophisticated rail carriers such as AOK and UP would not include superfluous provisions in their lease. I am troubled by this disconnect as well by the lack of information the Board has regarding the interchange commitment's impact on competition and shippers. Accordingly, I believe that the Board should have rejected this notice as inappropriate for the notice of exemption process.

On November 1, 2012, the Board announced that it was proposing new rules to require carriers to disclose more information when proposing transactions, such as this one, that contain an interchange commitment. *See Information Required in Notices & Petitions Containing Interchange Commitments,* EP 714 (STB served Nov. 1, 2012). While the comments in Docket No. EP 714 will come too late to inform the Board's actions here, I encourage both rail carriers and shippers to assist the Board in crafting a regime that provides appropriate scrutiny to these types of transactions.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–26883 Filed 11–1–12; 8:45 am]

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Part II

Securities and Exchange Commission

17 CFR Part 240
Clearing Agency Standards; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–68080; File No. S7–08–11]

RIN 3235 AL13

Clearing Agency Standards

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting a new rule in accordance with the Securities Exchange Act of 1934 (''Exchange Act''), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''). The new rule establishes minimum requirements regarding how registered clearing agencies must maintain effective risk management procedures and controls as well as meet the statutory requirements under the Exchange Act on an ongoing basis.

DATES: *Effective Date:* January 2, 2013.

FOR FURTHER INFORMATION CONTACT: Jeffrey Mooney, Assistant Director; Katherine Martin, Senior Special Counsel; Doyle Horn, Special Counsel; Stephanie Park, Special Counsel; or Justin Byrne, Attorney-Advisor; Office of Clearance and Settlement, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010 at (202) 551–5710.

SUPPLEMENTARY INFORMATION: The Commission is adopting rules for the operation of a registered clearing agency that identify minimum standards designed to enhance the regulatory framework for clearing agency supervision.

Table of Contents

I. Background

A. Statutory Framework for the Regulation of Clearing Agencies

1. Introduction

Congress directed the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions when it added Section 17A to the Exchange Act as part of the Securities Acts Amendments of 1975.[1] The Commission's ability to achieve this goal and its supervision of securities clearance and settlement systems is based upon the regulation of registered clearing agencies. Over the years, clearing agencies registered with the Commission have become an essential part of the infrastructure of the U.S. securities markets. Clearing agencies help reduce the costs of securities trading and are required to be carefully structured to manage and reduce counterparty risk.

The Commission used this experience with regulating clearing agencies to help address developments recently in the over-the-counter (''OTC'') derivatives markets. In December 2008, the Commission acted to facilitate the central clearing of credit default swaps (hereinafter referred to as ''credit default swaps'' or ''CDS''), the largest category of OTC security-based swaps, by permitting certain entities that performed central counterparty (''CCP'') services to clear and settle credit default swaps on a temporary, conditional basis.[2] Consequently, some credit

[1] *See* 15 U.S.C. 78q–1 and S. Rep. No. 94–75, at 4 (1975) (the Senate Committee on Banking, Housing and Urban Affairs urging that ''[t]he Committee believes the banking and security industries must move quickly toward the establishment of a fully integrated national system for the prompt and accurate processing and settlement of securities transactions'').

[2] The Commission authorized five entities to clear credit default swaps. *See* Exchange Act Release Nos. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009), 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010) and 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (CDS clearing by ICE Clear Europe Limited); 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009), 61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010) and 63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010) (CDS clearing by Eurex Clearing AG); 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), 61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010) and 63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010) (CDS clearing by Chicago Mercantile Exchange, Inc.); 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) and 63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010) (CDS clearing by ICE Trust US LLC); 59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009) (temporary CDS clearing by LIFFE A&M and

default swaps transactions were centrally cleared prior to the enactment of the Dodd-Frank Act.

2. Section 17A of the Exchange Act

Section 17A of the Exchange Act [3] and Rule 17Ab2–1 [4] require entities to register with the Commission prior to performing the functions of a clearing agency. Under the statute, the Commission is not permitted to grant registration unless it determines that the rules and operations of the clearing agency meet the standards set forth in Section 17A.[5] If the Commission registers a clearing agency, the Commission oversees the clearing agency to facilitate compliance with the Exchange Act using various tools that include, among other things, the rule filing process for self-regulatory organizations (''SROs'') and on-site examinations by Commission staff. Section 17A(d) also gives the Commission authority to adopt rules for clearing agencies as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act and prohibits a registered clearing agency from engaging in any activity in contravention of these rules and regulations.[6] Pursuant to Section 21(a) of the Exchange Act, the Commission can invoke its enforcement powers to initiate and conduct investigations to determine violations of the federal securities laws, including those specifically applicable to clearing agencies.[7] In so doing, the Commission may institute civil actions seeking injunctive and other equitable remedies and/or administrative proceedings to, among other things, suspend or revoke registration, impose limitations upon a clearing agency's activities, functions, or operations, or impose other sanctions.[8]

3. The Dodd-Frank Act

On July 21, 2010, President Barack Obama signed the Dodd-Frank Act into law.[9] The Dodd-Frank Act was enacted to, among other things, promote the financial stability of the United States by improving accountability and transparency in the financial system.[10]

a. Title VII of the Dodd-Frank Act

Title VII of the Dodd-Frank Act (''Title VII'') provides the Commission and the Commodity Futures Trading Commission (''CFTC'') with enhanced authority to regulate certain OTC derivatives in response to the recent financial crisis.[11] The Dodd-Frank Act is intended to bolster the existing regulatory structure and provide regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years and is capable of affecting significant sectors of the U.S. economy. Title VII provides that the CFTC will regulate ''swaps,'' the Commission will regulate ''security-based swaps,'' and the CFTC and the Commission will jointly regulate ''mixed swaps.'' [12]

Title VII was designed to provide greater certainty that, wherever possible and appropriate, swap and security-based swap contracts formerly traded exclusively in the OTC market are centrally cleared.[13] The swap and security-based swap markets traditionally have been characterized by privately negotiated transactions entered into by two counterparties, in which each assumes the credit risk of the other counterparty.[14] Clearing of swaps and security-based swaps was at the heart of Congressional reform of the derivatives markets in Title VII.[15] Clearing agencies are broadly defined under the Exchange Act and undertake a variety of functions.[16] One such function is to act as a CCP, which is an entity that interposes itself between the counterparties to a trade.[17] For example, when a security-based swap contract between two counterparties that are members of a CCP is executed and submitted for clearing, it is typically replaced by two new contracts—separate contracts between the CCP and each of the two original counterparties. At that point, the original parties to the transaction are no longer counterparties to each other. Instead, each acquires the CCP as its counterparty, and the CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP.[18] Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.[19] The Dodd-Frank Act

LCH.Clearnet Ltd.) (collectively, ''CDS Clearing Exemption Orders''). LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

[3] *See* 15 U.S.C. 78q–1(b). *See also* Public Law 111–203 § 763(b) (adding subparagraph (g) to Section 17 of the Exchange Act).

[4] *See* 17 CFR 240.17Ab2–1.

[5] Specifically, Sections 17A(b)(3)(A)–(I) identify determinations that the Commission must make about the rules and structure of a clearing agency prior to granting registration. *See* 15 U.S.C. 78q–1(b)(3)(A)–(I). The staff of the Commission provided guidance on meeting the requirements of Section 17A in its Announcement of Standards for the Registration of Clearing Agencies. *See* Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 23, 1980).

[6] *See* 15 U.S.C. 78q–1(d).

[7] *See* 15 U.S.C. 78u.

[8] *See id.; see also* 15 U.S.C. 78s(h).

[9] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[10] *See id.*

[11] *See id.* secs. 701–774.

[12] Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall further define the terms ''swap,'' ''security-based swap,'' ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' ''eligible contract participant'' and ''security-based swap agreement.'' The Commission and the CFTC jointly adopted rules to further define the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant'' and eligible contract participant.'' *Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'',* Securities Exchange Act Release No. 34–66868 (Apr. 27, 2012).

[13] *See, e.g.,* Report of the Senate Committee, *supra* note 11, at 34 (stating that ''[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.'').

[14] *See, e.g.,* Financial Stability Board, *Implementing OTC Derivatives Market Reforms* (Oct. 25, 2010), *available at http://www.financialstabilityboard.org/publications/r_101025.pdf.*

[15] As previously noted, the Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market be cleared. *See supra* note 11.

[16] Section 3(a)(23)(A) of the Exchange Act defines the term ''clearing agency'' to mean any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for the comparison of data regarding the terms of settlement of securities transactions to reduce the number of settlements of securities transactions or the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. 15 U.S.C. 78c(a)(23)(A).

[17] *See id.* An entity that acts as a CCP for securities transactions is a clearing agency as defined in the Exchange Act and is required to register with the Commission.

[18] *See* Cecchetti, Gyntelberg and Hollanders, *Central Counterparties for Over-the-Counter Derivatives,* Bank for International Settlement Quarterly Review (Sept. 2009), *available at http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf.*

[19] *See id.* at 46; *see also* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Guidance on the Application of the 2004 CPSS–IOSCO Recommendations for Central*

Continued

amended the Exchange Act to require, among other things, that transactions in security-based swaps must be cleared through a clearing agency if they are of a type that the Commission determines must be cleared, unless an exemption from mandatory clearing applies.[20] Title VII of the Dodd-Frank Act also added new provisions to the Exchange Act that require entities that act as a clearing agency with respect to security-based swaps (''security-based swap clearing agencies'') to register with the Commission [21] and require the Commission to adopt rules with respect to security-based swap clearing agencies.[22] Compliance with any such rules is a prerequisite to the registration of a clearing agency with the Commission and is also a condition to the maintenance of its continued registration.[23] Finally, Title VII provided that some of the entities that the Commission permitted to clear and settle credit default swaps on a temporary, conditional basis prior to the July 21, 2010, enactment of the Dodd-Frank Act were deemed to be registered clearing agencies (the ''Deemed Registered Provision'').[24]

Counterparties to OTC Derivatives CCPs: Consultative Report (May 2010), *available at http://www.bis.org/publ/cpss89.pdf.*

[20] *See* 15 U.S.C. 78c–3; Exchange Act Release No. 34–63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010); Exchange Act Release No. 34–67286 (June 28, 2012); 34–63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010).

[21] 15 U.S.C. 78q–1(g) (adding subparagraph (g) to Section 17A of the Exchange Act). Pursuant to Section 774 of the Dodd-Frank Act, the requirement in Section 17A(g) of the Exchange Act for security-based swap clearing agencies to be registered with the Commission took effect on July 16, 2011.

[22] 15 U.S.C. 78q–1(i) and (j). Public Law 111–203 sec. 763(b) (adding subparagraphs (i) and (j) to Section 17A of the Exchange Act).

[23] Under the Exchange Act, a clearing agency can be registered with the Commission only if the Commission makes a determination that the clearing agency satisfies the requirements set forth in paragraphs (A) through (I) of Section 17A(b)(3) of the Exchange Act. 15 U.S.C. 78q–1(b)(3).

[24] *See* 15 U.S.C. 78q–1(l). The Deemed Registered Provision applies to certain depository institutions that cleared swaps as multilateral clearing organizations and certain derivatives clearing organizations (''DCOs'') that cleared swaps pursuant to an exemption from registration as a clearing agency. As a result, ICE Clear Credit LLC, ICE Clear Europe Limited and the Chicago Mercantile Exchange, Inc. were deemed registered clearing agencies with the Commission on July 16, 2011, solely for the purpose of clearing security-based swaps. Under this Deemed Registered Provision, an eligible clearing agency is deemed registered for the purpose of clearing security-based swaps and is therefore required to comply with all requirements of the Exchange Act, and the rules thereunder, applicable to registered clearing agencies, including, for example, the obligation to file proposed rule changes under Section 19(b) of the Exchange Act.

b. Title VIII of the Dodd-Frank Act

In addition to the provisions from Title VII that expand the Commission's authority under the Exchange Act to include activities related to security-based swaps, Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), establishes an enhanced supervisory and risk control system for systemically important clearing agencies and other financial market utilities (''FMUs'').[25] In part, the Clearing Supervision Act provides that the Commission, considering relevant international standards and existing prudential requirements, may prescribe regulations that contain risk management standards for the operations related to payment, clearing, and settlement activities (''PCS Activities'') [26] of a Designated Clearing Entity or the conduct of designated activities by a Financial Institution.[27] In prescribing such standards, the Commission must consult the Board of Governors of the Federal Reserve System (''Federal Reserve'' or ''the Board'') and the Financial Stability Oversight Council (''Council''). On July 11, 2011, the Council published a final rule concerning its authority to designate FMUs as systemically important,[28] and on July 18, 2012, the Council designated The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC''), National Securities Clearing Corporation (''NSCC'') and The Options Clearing Corporation (''OCC'') as systemically important.[29]

B. International Considerations

Section 17A(i) of the Exchange Act provides that the Commission, in establishing clearing agency standards and in its oversight of clearing agencies, may conform such standards and such oversight to reflect evolving international standards.[30] Section 805(a) of the Clearing Supervision Act directs the Commission to take into consideration relevant international standards and existing prudential requirements for clearing agencies that are designated as FMUs.[31] The current international standards most relevant to risk management of clearing agencies

[25] *See infra* note 29. Under Section 803 of the Clearing Supervision Act, clearing agencies may be FMUs. Therefore, the Commission may be the Supervisory Agency of a clearing agency that is designated as systemically important (''Designated Clearing Entity'') by the Financial Stability Oversight Council (''Council''). *See* 12 U.S.C. 5463. The definition of ''FMU,'' which is contained in Section 803(6) of the Clearing Supervision Act, contains a number of exclusions including, but not limited to, designated contract markets, registered futures associations, swap data repositories, swap execution facilities, national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, security-based swap execution facilities, brokers, dealers, transfer agents, investment companies and futures commission merchants. 12 U.S.C. 5462(6)(B). The designation of systemic importance hinges on a determination by the Council that the failure of, or a disruption to, the functioning of the FMU could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. *See* 12 U.S.C. 5463(a)(2)(A)–(E). The designation of an FMU is significant, in part, because it will subject such designated entity to heightened oversight consistent with the terms of the Clearing Supervision Act. For example, the Clearing Supervision Act requires the Supervisory Agency to examine at least once annually any FMU that the Council has designated as systemically important. The Commission intends to conduct such annual statutory cycle examinations on the Commission's fiscal year basis. The Commission staff anticipates conducting the first annual statutory cycle examination of any designated FMU for which it is the Supervisory Agency in the annual cycle following such designation.

[26] Certain post-trade processing activities that are not captured by the Clearing Supervision Act may nevertheless be subject to regulation by the Commission under the Exchange Act. *See infra* note 100 and accompanying text.

[27] *See* Section 805(a)(2) of the Clearing Supervision Act. Those regulations may govern ''(A) the operations related to payment, clearing, and settlement activities of such designated clearing entities; and (B) the conduct of designated activities by such financial institutions.'' 12 U.S.C. 5464(a)(2). PCS Activities are defined in Section 803(7) of the Clearing Supervision Act. 12 U.S.C 5462(7).

The definition of ''financial institution,'' which is contained in Section 803(5) of the Clearing Supervision Act, outlines numerous exclusions but defines financial institution as a branch or agency of a foreign bank, an organization operating under Section 25 or 25A of the Federal Reserve Act, a credit union, a broker or dealer, an investment company, an insurance company, an investment adviser, a futures commission merchant, commodity trading advisor or commodity pool operator and any company engaged in activities that are financial in nature or incidental to a financial activity. 12 U.S.C. 5462(5)(A).

[28] *See* 76 FR 44763 (July 27, 2011) (the Council also expects to address the designation of payment, clearing, or settlement activities as systemically important in a separate rulemaking).

[29] *See* 12 U.S.C. 5321 (establishing the Council and designating its voting and nonvoting members); *see also* 12 U.S.C. 5463 (designation of systemic importance). In accordance with Section 804 of the Clearing Supervision Act, the Council has the authority, on a non-delegable basis and by a vote of not fewer than two-thirds of the members then serving, including the affirmative vote of its chairperson, to designate those FMUs that the Council determines are, or are likely to become, systemically important. The Council may, using the same procedures, rescind such designation if it determines that the FMU no longer meets the standards for systemic importance. Before making either determination, the Council is required to consult with the Board and the relevant Supervisory Agency as determined in accordance with Section 803(8) of the Clearing Supervision Act. Section 804 also sets forth procedures that give entities 30 days advance notice and an opportunity for a hearing prior to being designated as systemically important.

[30] 15 U.S.C. 78q–1(i).

[31] 12 U.S.C. 5464(a)(1).

are the standards developed by the International Organization of Securities Commissions (''IOSCO'') and the Committee on Payment and Settlement Systems (''CPSS'') that are contained in the report entitled *Principles for Financial Market Infrastructures* (''FMI Report'').[32] The final FMI Report was published on April 16, 2012, and replaces CPSS and IOSCO's previous standards applicable to clearing agencies that were contained in the following reports: *Recommendations for Securities Settlement Systems* (2001) (''RSSS'') and *Recommendations for Central Counterparties* (2004) (''RCCP'') (collectively, ''CPSS–IOSCO Recommendations'').[33] These international standards were formulated by securities regulators and central banks to promote sound risk-management practices and encourage the safe design and operation of entities that provide clearance and settlement services. The FMI Report harmonizes and, where appropriate, strengthens the previous international standards; it also incorporates additional guidance for OTC derivatives CCPs.[34]

II. Overview of Proposal and General Comments Received on the Proposing Release and Commission Response

A. Summary of the Clearing Agency Standards Proposing Release

On March 3, 2011, the Commission proposed for comment a series of rules related to standards for the operation and governance of clearing agencies (''Proposing Release'').[35] The Proposing Release contained the following proposals:

(1) Proposed Rule 17Ad–22, which would require certain minimum standards for all clearing agencies registered with the Commission;

(2) Proposed Rule 17Aj–1, which would require dissemination of pricing and valuation information by security-based swap CCPs;

(3) Proposed Rule 17Ad–23, which would require all clearing agencies to have adequate safeguards and procedures to protect the confidentiality of trading information of clearing agency participants;

(4) Proposed Rule 17Ad–24, which would exempt certain security-based swap dealers and security-based swap execution facilities from the definition of clearing agency;

(5) Proposed Rule 17Ab2–1, which would amend an existing Commission rule concerning registration of clearing agencies to account for security-based swap clearing agencies and to make other technical changes;

(6) Proposed Rule 17Ad–25, which would require all clearing agencies to have procedures that identify and address conflicts of interest;

(7) Proposed Rule 17Ad–26, which would require clearing agencies to set standards for all members of their boards of directors or committees; and

(8) Proposed Rule 3Cj–1, which is modeled on Section 3C(j) of the Exchange Act and would require all clearing agencies to designate a chief compliance officer.

The Commission also noted in the Proposing Release that the definition of clearing agency under Section 3(a)(23)(A) of Exchange Act includes any person who:

- Acts as an intermediary in making payments or deliveries or both in connection with transactions in securities;
- Provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities;
- Acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or
- Otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository).[36]

Based on the Exchange Act definition, the Commission stated its preliminary view that certain post-trade processing services may fall within the clearing agency definition and asked for comments regarding the Commission's preliminary interpretation.

Since the publication of the Proposing Release, the Commission has received 25 comment letters on the Proposing Release from a broad range of market participants, and the Commission and staff also had discussions with representatives of clearing agencies, trade associations, public interest groups and other interested parties.[37] The Commission has taken into consideration international initiatives and consulted with other U.S. financial regulators as appropriate, including the

[32] CPSS–IOSCO, *Principles for Financial Market Infrastructures* (Apr. 2012), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf.*

[33] The complete RSSS and RCCP Reports are available on the Web site of the Bank for International Settlements at *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD123.pdf* and *http://www.iosco.org/library/pubdocs/pdf/IOSCPD176.pdf* respectively.

The Board applies these standards in its supervisory process and expects systemically important systems, as determined by the Board and subject to its authority, to complete a self-assessment against the standards set forth in the policy. *See* Policy on Payment System Risk, 72 FR 2518 (Jan. 12, 2007).

[34] *See FMI Report, supra* note 32.

[35] *See* Exchange Act Release No. 34–64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (''Proposing Release''), *available at http://www.sec.gov/rules/proposed/2011/34–64017fr.pdf.*

[36] 15 U.S.C. 78c(a)(23)(A).

[37] The comment file is published on the Commission's Web site, *available at http://www.sec.gov/comments/s7-08-11/s70811.shtml. See* Letter from American Benefits Council, dated May 6, 2011 (''ABC Letter''); letter from Chris Barnard, dated March 21, 2011 (''Barnard Letter''); letter from Dennis M. Kelleher, President & CEO and Steven W. Hall, Securities Specialist, Better Markets, Inc., dated April 29, 2011 (''Better Markets Letter''); letter from Joanne Medero, Richard Prager and Supurna VedBrat, BlackRock, dated April 29, 2011 (''BlackRock Letter''); letter from Craig S. Donohue, CME Group, dated April 29, 2011 (''CME Letter''); letter from Glenn Davis, Senior Research Associate, Council of Institutional Investors, dated April 14, 2011 (''CII Letter''); letter from Ernst & Young, dated April 29, 2011 (''ENY Letter''); letter from Mark Beeston, Chief Executive Officer of Portfolio Risk Services, ICAP®, dated July 7, 2011 (''ICAP Letter''); letter from R. Trabue Bland, Intercontinental Exchange, Inc., dated April 29, 2011 (''ICE Letter''); letter from Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, dated April 29, 2011 (''ISDA Letter''); letter from Ian Axe, CEO, LCH.Clearnet Group Limited, dated April 28, 2010 (''LCH Letter''); letter from Stuart J. Kaswell and Carlotta King, Managed Funds Association, dated March 24, 2011 (''MFA (Kaswell/King) Letter''); letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association, dated April 29, 2011 (''MFA (Kaswell) Letter''); letter from Kevin Gould, President, Markit™, dated April 29, 2011 (''Markit™ (April) Letter''); letter from Kevin Gould, President, Markit™, dated July 26, 2011 (''Markit™ (July) Letter''); letter from Jeff Gooch, CEO, MarkitSERV™, dated April 29, 2011 (''MarkitSERV™ (April) Letter''); letter from Jeff Gooch, CEO, MarkitSERV™, dated July 18, 2011 (''MarkitSERV™ (July) Letter''); letter from Norman Reed, General Counsel, Omgeo, dated May 5, 2011 (''Omgeo Letter''); letter from Larry E. Thompson, General Counsel, The Depository Trust & Clearing Corporation, dated April 29, 2011 (''The DTCC (April) Letter''); letter from Larry E. Thompson, General Counsel, The Depository Trust & Clearing Corporation, dated July 21, 2011 (''The DTCC (July) Letter''); letter from William H. Navin, Executive Vice President, General Counsel and Secretary, The Options Clearing Corporation, dated April 29, 2011 (''The OCC Letter''); letter from James Cawley, Co-Founder, Swaps and Derivatives Market Association, dated June 3, 2011 (''SDMA (June) Letter''); letter from Christoffer Mohammar, General Counsel, TriOptima Group, dated April 29, 2011 (''TriOptima Letter''); letter from Richard H. Baker, President & Chief Executive Officer, Managed Funds Association, dated March 24, 2011 (''MFA (Baker) Letter''); letter from James Cawley, Co-Founder, Swaps and Derivatives Market Association, dated April 19, 2011 (''SDMA (April) Letter'').

CFTC and the Federal Reserve, to inform the Commission's final actions. Commenters generally supported the goals of the proposal. As further discussed below, however, several commenters recommended that the proposal be amended or clarified in certain respects.

After careful review and consideration of the comments, the Commission is today adopting Rule 17Ad–22, with certain modifications discussed below, to address comments received. As adopted, Rule 17Ad–22 is meant to establish minimum requirements for registered clearing agency risk management practices and operations with due consideration given to equivalent standards of other regulators in the United States [38] and to international standards, as discussed above in Section I.B. We expect to address separately the other proposed rules and matters contained in the Proposing Release as explained in more detail in Section II.B below.

B. General Comments Received on the Proposing Release and the Commission Response

The Proposing Release was published in the **Federal Register** on March 16, 2011, and the comment period closed on April 29, 2011.[39] The Proposing Release contained proposed rules that cover various aspects of a clearing agency's operations and risk management that are listed in full in Section II.A. In addition to specific comments regarding the substance of the rules in the Proposing Release, a number of the comments the Commission received concern the larger framework for our rulemaking efforts involving clearing agencies and the manner in which the rules may be implemented. These comments focus on issues such as ensuring that: (1) Sufficient time be given to clearing agencies to implement all new standards appropriately; (2) the Commission's regulations relating to risk management standards in particular be given careful consideration and recognize the complexity of the issues involved; (3) the Commission's regulations are consistent with those of other U.S. regulatory agencies and CPSS and IOSCO initiatives; and (4) appropriate distinctions between clearing agencies that provide CCP and central securities depository (''CSD'') services from those that provide post-trade processing services are recognized in the Commission's regulations.

Set forth below is a description of the comments received by the Commission that express concerns about the general approach to clearing agency reform reflected in the Proposing Release. The Commission has carefully considered these general comments that were provided concerning the larger framework for our rule making efforts involving clearing agencies.[40] To address the concerns they raise, we have determined to take the actions described below.

1. Timing of Implementation

a. Comments Received

Three commenters asked for the implementation of the proposed rules to be subject to appropriate phase-in periods.[41] One commenter suggested that the appropriate phases should be determined by the Commission in consultation with the affected clearing agencies.[42] Another commenter requested that if the rules are adopted as proposed then they should not become effective for at least two years.[43] Two commenters stated that they believe that implementing all of the proposed rules in the Proposing Release at the same time would require extensive new policies and procedures, drafting, proposing and approval of rules and rule changes, raising additional financial resources, hiring and training of personnel, operational changes and many other tasks that would require clearing agencies to simultaneously respond to separate requirements promulgated under the Dodd-Frank Act.[44] Accordingly, these commenters requested that the Commission provide adequate time to implement necessary changes and expressed that phase-in periods would be appropriate.

One commenter asked the Commission to publish any modifications it may make to the proposed rules for an additional comment period.[45] Others stressed that if the Commission makes significant changes to its proposed rules, then the rules should be republished for further comment.[46]

One commenter stated that clearing agency rules such as those related to governance, conflicts of interest, registration, and financial resources should be adopted early in the implementation of rules for the security-based swap market.[47] The commenter also stated that barriers to effective ''buy-side'' participation in CCPs must be eliminated early in the phase-in process to enable ''buy-side'' participants to clear voluntarily at the same time as dealers.[48]

b. Commission Response

In light of the request by commenters for a phased approach to implementation of the clearing agency standards set forth in the Proposing Release,[49] the Commission has decided to address the standards in stages.

- In the first stage, the Commission is adopting only Rule 17Ad–22. The compliance date for Rule 17Ad–22 will be sixty days from publication in the **Federal Register**.
- The second planned stage in the implementation of standards for clearing agencies is the consideration by the Commission of rules that correspond to proposed Rules 17Aj–1; 17Ad–23; 17Ad–24; 17Ab2–1 and 3Cj–1 as well as the clearing agency governance and conflict of interest concerns that its previous proposal addressed through its proposal of Rule 17Ad–25, Rule 17Ad–26 and Regulation MC.[50]
- The third planned stage is for the Commission to consider rules tailored to clearing agencies that perform certain post-trade processing services. The Commission sought comment concerning these types of clearing agencies in the Proposing Release and preliminarily intends to propose rules addressed to them as described in more detail in Sections II.B.4 and III.A below. As appropriate, the Commission may

[38] *See Derivatives Clearing Organization General Provisions and Core Principles* 76 FR 69334 (Nov. 8, 2011) (CFTC adopting final regulations to implement certain provisions of Title VII and Title VIII of the Dodd-Frank Act governing DCO activities) (''DCO Release''); *Financial Market Utilities* 76 FR 18445 (Apr. 4, 2011) (notice of proposed rulemaking to promulgate risk-management standards governing the operations related to the payment, clearance and settlement activities of certain financial market utilities that are designated systemically important by the Council).

[39] *See supra* note 35.

[40] *See supra* note 9, at Preamble.

[41] *See* The DTCC (April) Letter at 5; The OCC Letter at 17; MFA (Kaswell/King) Letter at 2.

[42] *See* The DTCC (April) Letter at 5.

[43] *See* The OCC Letter at 17 (adding that if the Commission adopts a financial resources standard in Rule 17Ad–22(b)(3) to require a security-based swaps clearing agency that performs CCP services to have enough financial resources to be able to withstand the default of its two largest participants in extreme but plausible market conditions then that requirement should be subject to delayed implementation of at least two years).

[44] *See id.;* The DTCC (April) Letter at 6.

[45] *See* The DTCC (April) Letter at 2.

[46] *See* The OCC Letter at 17.

[47] *See* MFA (Kaswell/King) Letter at Annex A.

[48] *See id.*

[49] *See supra* notes 41–44 and accompanying text.

[50] *Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC,* Exchange Act Release No. 344–63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (''Regulation MC'').

also propose rules that will incorporate principles set forth in the FMI Report.

The Commission believes the phased approach to implementation provides clearing agencies with the benefit of additional time with respect to some of the requirements contemplated in the Proposing Release, while putting into place minimum standards for operational and risk management practices of registered clearing agencies. This approach will allow the Commission to consider further the comments received on the Proposing Release and evolution of clearance and settlement activity in light of the requirements of Title VII and Title VIII of the Dodd-Frank Act, including the implementation of the mandatory clearing requirements with respect to security-based swaps mandated by the Dodd-Frank Act. Because the Commission is adopting 17Ad–22 largely as proposed, the Commission is not republishing Rule 17Ad–22 for additional comments.

We believe that the implementation of these standards is an important first step in crafting regulatory changes contemplated by Title VII and Title VIII of the Dodd-Frank Act as intended by Congress. The adoption of Rule 17Ad–22 will also allow the Commission to coordinate its activities as the supervisory agency for clearing agencies designated as systemically important financial market utilities under Title VIII of the Dodd-Frank Act with the complementary responsibilities of the Federal Reserve.[51] In addition, the Commission believes that the adoption of standards for registered clearing agencies at this time will help facilitate the development of the security-based swap market. Rule 17Ad–22 establishes minimum standards for a wide range of issues, including governance, financial resources and membership. For example, Rules 17Ad–22(b)(5), (6) and (7) are designed to prohibit membership practices that may limit competition among market participants. In particular, Rule 17Ad–22(b)(6) is designed to facilitate correspondent clearing, which will allow buy-side participants to obtain access to CCP services without having to become direct members of a clearing agency.

[51] Section 805 of the Clearing Supervision Act provides that (i) the Commission may prescribe standards for designated clearing entities in consultation with the Council and the Board and (ii) the Board may determine that the Commission's existing prudential requirements with respect to designated clearing entities are insufficient to prevent or mitigate significant credit, liquidity, operational or other risks to the financial markets or the financial stability of the United States.

2. Special Attention to Risk Management Standards

a. Comments Received

Generally, commenters supported the requirements of proposed Rules 17Ad–22(b)(1)–(4) that would govern the risk management standards and practices of registered clearing agencies that perform CCP services or CCPs.[52] However, in several respects, commenters asked the Commission to pay special attention to the technical nature of CCP risk management practices that are addressed by these rules. The comments received by the Commission span a range of views on these matters. But thematically, many of them coalesce around a question of whether the Commission should prescribe detailed specifications within these rules to define compliance standards more clearly or take a less prescriptive approach that affords clearing agencies greater discretion to establish, implement, maintain and enforce policies and procedures based on the facts and circumstances of the individual clearing agency.

For instance, proposed Rule 17Ad–22(b)(1) would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to measure credit exposures to participants at least once a day and limit exposures to potential losses from defaults by its participants in normal market conditions so that the operations of the clearing agency would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control. Of those commenters who asked the Commission to consider modifications to the proposed rule, two suggested that public disclosure requirements should accompany any choice made by a CCP to reduce margin requirements on the basis of an inverse or offsetting correlation between participants' positions.[53] Several others focused on what role the Commission should take in defining ''normal market conditions'' for purposes of the rule[54] as well as how frequently a CCP should be required to measure its credit exposures[55] and whether such measurements should be required to include the customers of participants.[56]

Proposed Rule 17Ad–22(b)(2) would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models[57] to set margin requirements and review them at least monthly. One commenter argued that CCPs should be required to make their margin-setting methodology available to customers to help them understand the responsibilities that are commensurate with CCP participation.[58] Another commenter suggested clearing agencies should have discretion when complying with the rule to decide which aspects of a margin methodology are appropriate for monthly review.[59] Still other commenters concentrated on the extent to which the Commission should prescribe the parameters of a CCP's margin model, such as the confidence level, amount of data used to inform the standard of ''normal market conditions,'' and the use of factors such as liquidity and concentration.[60]

With respect to proposed Rule 17Ad–22(b)(3), commenters asked the Commission to give further consideration to whether it is appropriate to create different financial resources standards for a security-based swap CCP. As proposed, the rule would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain sufficient financial resources to withstand, at a minimum, a default by the participant to which it has the largest exposure in extreme but plausible market conditions, provided that a security-based swap clearing agency would be required to maintain sufficient financial resources to withstand, at a minimum, a default by the two participants to which it has the largest exposures in extreme but plausible market conditions. One commenter argued that characteristics of the instruments traded in the security-based swap market support differentiating the requirements of the rule[61] while other commenters advanced reasons for why it may be appropriate for the rule to employ only a single standard.[62] Commenters also highlighted that it is important for the Commission to account for the

[52] *See* discussion *infra* Section III.C.

[53] *See* ISDA Letter at 7; Better Markets Letter at 3–4.

[54] *See* The OCC Letter at 7; Better Markets Letter at 3–4.

[55] *See* LCH Letter at 2; Better Markets Letter at 5.

[56] *See* LCH Letter at 2.

[57] The term ''risk-based models'' is meant to encompass any models, systems and associated parameters used by clearing agencies to mitigate risks.

[58] *See* MFA (Kaswell) Letter at 2.

[59] *See* The OCC Letter at 7.

[60] *See, e.g.,* ISDA Letter at 7; Better Markets Letter at 3–4; The OCC Letter at 7.

[61] *See* Better Markets Letter at 5.

[62] *See* LCH Letter at 2; The OCC Letter at 8; The DTCC (April) Letter at 12.

international standards in this area[63] and they expressed contrasting views about how standardized and prescriptive the Commission should be in specifying the meaning of ''extreme but plausible market conditions.''[64]

Similarly, some commenters asked the Commission to reconsider how prescriptive it should be in its approach to the requirements of Rule 17Ad–22(b)(4).[65] The proposed rule would require a CCP to establish, implement, maintain and enforce policies and procedures reasonably designed to provide for an annual model validation consisting of the evaluation of the performance of the clearing agency's margin models and the related parameters and assumptions associated with such models by a qualified person who does not perform functions associated with the clearing agency's margin models (except as part of the annual model validation) and does not report to a person who performs those functions. In this area, commenters expressed contrasting views about the appropriate level of detail that should be embedded within the rule to guide clearing agency practices. The comments addressed matters including how frequently a model validation should be performed[66] and, when a model validation is performed, how a CCP should be required to ensure that the process represents a candid, independent and objective assessment.[67]

A more complete discussion of these comments and others that pertain to Rules 17Ad–22(b)(1)–(4) is contained in Section III.C below.

b. Commission Response

The Commission acknowledges the many thoughtful comments we received regarding the risk management standards and practices reflected in the Proposing Release and agrees that the topic deserves particular care and attention.[68] We also agree with the commenters who pointed out that:

- Many of the risk management standards and practices underlying proposed Rule 17Ad–22 require relatively significant judgments to be made and at times there are no established or definitive sources of guidance to aid decision-making. Therefore, for a CCP's risk management practices to be most effective, the CCP must have some degree of flexibility to tailor the practices appropriately to meet the demands of the specific financial markets it serves, and the Commission's interpretation of Rule 17Ad–22 should not be rigidly applied as uniform standards without variation.[69]
- The specific risk management practices most appropriate for any individual CCP and for registered clearing agencies generally are unlikely to remain static.[70] Rather, risk management practices can be expected to evolve to keep pace with changes in technology, market practices and financial professionals' understanding of the characteristics of the markets.[71]

For example, the Commission recognizes that a less prescriptive approach can help promote efficient practices and encourage regulated entities to consider how to manage their regulatory obligations and risk management practices in a way that complies with Commission rules while accounting for the particular characteristics of their business and believes the approach reflected in proposed Rule 17Ad–22 is consistent with this perspective.

The Commission believes that one outgrowth of this less prescriptive approach is that there may be additional questions from the clearing agencies regarding how various regulatory requirements apply with regard to clearance and settlement services for particular instruments or products having different market characteristics. Commenters were particularly concerned with the application of Rules 17Ad–22(b)(1)–(4) and with particular risk management standards, including, but not limited to, the proper amount of financial resources, measurement and management of credit exposures, back testing, model validation, use of concentration, liquidity and other factors to determine margin requirements, and the appropriate meaning of ''extreme but plausible market conditions.''

We note that the Commission or its staff may from time to time issue additional guidance to the extent necessary to address questions arising from the dynamic nature of clearing agency risk management practices, changing market practices, and technological advances.

To date, the Exchange Act and the related regulations promulgated by the Commission have not established particularized requirements regarding clearing agencies' risk management practices.[72] Nevertheless, CCPs registered as clearing agencies generally adopt margin requirements designed to cover potential losses under normal market conditions to help ensure the financial safety of the enterprise, protect the interests of clearing members, and meet or exceed standards of risk management best practices recognized in the financial services industry generally.[73] Additional charges, including, but not limited to, those contained in separately constituted default or guaranty funds are also used to cover losses beyond that (*i.e.,* tail events associated with extreme but plausible market conditions).[74]

To meet this standard, the current practice of registered CCPs is to calculate daily margin requirements using risk-based models to ensure coverage at a 99% confidence interval over a designated time horizon.[75] Given the history of usage of this standard in CCP practices and international standards,[76] the Commission believes it is appropriate to codify this commonly accepted practice as the minimum benchmark for measuring credit exposures and setting margin requirements. However, the Commission also recognizes that this minimum standard may not be sufficient for all CCPs and believes the rules allow flexibility for CCPs to adopt more conservative approaches when appropriate given the nature of the financial product being cleared, the preferences of their members, or other factors consistent with the general responsibilities of clearing agencies under the Exchange Act to perfect the national clearance and settlement system.

Furthermore, the Commission notes that a CCP can develop rules and

[63] *See* The OCC Letter at 9; LCH Letter at 2–3.

[64] *See* Better Markets Letter at 5–6; The DTCC (April) Letter at 10; The OCC Letter at 10.

[65] *See, e.g.,* The DTCC (April) Letter at 13; The OCC Letter at 11; Better Markets Letter at 6.

[66] *See* The DTCC (April) Letter at 13; Better Markets Letter at 6.

[67] *See* The DTCC (April) Letter at 13–15; The OCC Letter at 11; Better Markets Letter at 6.

[68] *See* discussion *supra* Section II.B.

[69] *See infra* notes 82–84 and accompanying text.

[70] *See infra* note 79 and accompanying text.

[71] *See* The DTCC (April) Letter at 6 (''As markets continue to globalize and standards continue to evolve, the Commission should consider additional modifications to its rules, as necessary and appropriate, to meet the important objective that the Commission's rules remain in alignment with global standards.'').

[72] *See generally* Section 17A of the Exchange Act (15 U.S.C. 78q–1) and Standards for Clearing Agency Regulation (Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 23, 1980)).

[73] *See, e.g.,* NSCC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Nov. 14, 2011), *available at http://www.dtcc.com/legal/compliance/NSCC_Self_Assessment.pdf.*

[74] *See* CME Group letter to CPSS–IOSCO regarding the Consultation Report: Principles for Financial Market Infrastructures (July 28, 2011), *available at http://www.bis.org/publ/cpss94/cacomments/cmegroup.pdf.*

[75] *See infra* Section V.B.2 (discussion on current industry baselines).

[76] *See infra* note 571 and accompanying text.

procedures that are tailored to its practices and operations in order to meet the demands of the specific financial markets it serves. When a CCP proposes to make rule changes, rule changes are required to be submitted to the Commission under Section 19(b) of the Exchange Act and are subject to review, public comment and approval, as applicable. In addition to the SRO rule filing process, the Commission works closely with each clearing agency it oversees from the point of its application for registration with the Commission and thereafter through examinations and periodic monitoring of the clearing agency's risk management framework and operations.[77]

3. Coordinated U.S. Domestic and International Standards

a. Comments Received

Three commenters strongly encouraged the Commission and the CFTC to coordinate and cooperate in the development of their parallel regulation of clearing agencies and derivatives clearing organizations (''DCOs'') to build a harmonized U.S. framework for OTC derivatives and to bring appropriate consistency to the two agencies' regulation of similar products, practices and markets.[78]

One commenter stressed that rules applicable to clearance and settlement of single name credit default swaps should be comparable to the final requirements applicable to clearance and settlement of index-based credit default swaps because clearinghouses will undoubtedly service both and therefore different sets of compliance standards could lead to unnecessary operational inefficiencies and may have the unintended consequence of tilting the market in favor of one class of instruments.[79]

Three commenters urged the Commission to incorporate specific requirements for processing, clearing and transfer of customer positions.[80] Two of the commenters urged the Commission to adopt specific rules in these areas that are similar to what the CFTC has proposed for DCOs—specifically with respect to proposed Rule 39.12(b)(7).[81]

Three commenters expressed a preference for principles-based rather than prescriptive rules.[82] One commenter expressed its belief that the CFTC's proposals for DCOs are overly prescriptive and should be eschewed in favor of case-by-case review of a clearing organizations' proposed rule changes.[83] The commenter added that less prescriptive rules will be easier to reconcile between the two regulatory agencies.[84]

One commenter strongly encouraged the Commission to avoid final action on its proposed rules before it has clarity on what clearinghouse regulations are ultimately adopted by European and United Kingdom regulators and what approaches to regulation are embraced by the final FMI Report.[85] The commenter argued that this approach would allow the Commission to adopt rules that would not unknowingly force market activity into other jurisdictions by virtue of associated regulatory costs.[86]

b. Commission Response

We recognize that both domestic and foreign regulators may be undertaking similar regulatory initiatives with respect to risk management and operation of clearing agencies. We believe that adopting Rule 17Ad–22 now, largely in the form proposed, and the phased implementation schedule set forth above[87] will ensure that the Commission's rulemaking for clearing agencies will be coordinated with equivalent processes being undertaken by the CFTC and the Federal Reserve in the United States and foreign regulators. As discussed above, the CPSS–IOSCO Recommendations served as the benchmark for the operations of the CCPs and CSDs around the world since the publication of the RSSS in 2001 and the RCCP in 2004, respectively. In addition, the CFTC and Federal Reserve have also considered the CPSS–IOSCO Recommendations in their rulemaking efforts with respect to the clearance and settlement process. Consequently, the final rules that the CFTC recently adopted to govern the activities of a DCO[88] and the rules proposed by the Federal Reserve for certain CCPs and CSDs[89] each borrow from the principles in the CPSS–IOSCO Recommendations and reflect requirements that we believe are consistent with the minimum requirements for registered clearing agencies that the Commission is adopting in Rule 17Ad–22. Because Rule 17Ad–22 will generally codify existing practices that similarly reflect the CPSS–IOSCO Recommendations, the Commission does not believe it will conflict with regulatory requirements that are being implemented by other regulators or in other jurisdictions.

4. Appropriate Distinctions Between Clearing Agencies

a. Comments Received

In the Proposing Release, the Commission identified certain services in the area of post-trade securities processing that may be captured by the definition of a clearing agency in the Exchange Act. Two commenters generally supported the distinctions the Commission proposed for rules that should apply to all types of clearing agencies versus those that should apply only to CCPs.[90] Several commenters argued that entities that perform certain post-trade processing services (*i.e.,* comparison of trade data, collateral management and tear-up/compression) are not performing services that fall within the definition of a clearing agency under the Exchange Act and consequently entities that perform these services should not be required to register as a clearing agency or comply with Rule 17Ad–22.[91]

b. Commission Response

We are not persuaded by commenters who suggested that post-trade processing services should be automatically excluded from the definition of a clearing agency in the Exchange Act.[92] We believe that view is inconsistent with the plain meaning of the clearing agency definition because the definition of clearing agency in

[77] *See Risk Management Supervision of Designated Clearing Entities* (July 2011), Report by the Commission, Board and CFTC to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act, at 25.

[78] *See* ICE Letter at 2; MFA (Kaswell) Letter at 8–9; CME Letter at 4.

[79] *See* CME Letter at 4.

[80] *See* MFA (Kaswell) Letter at 8–9; SDMA (June) Letter at 19; Barnard Letter at 2.

[81] *See* MFA (Kaswell) Letter at 8–9; SDMA (June) Letter at 19 (citing proposed rule 39.12(b)(7) from the CFTC's Requirements for Processing, Clearing and Transfer of Customer Positions, 76 FR 13101 (Mar. 10, 2011) which would require ''each derivatives clearing organization to coordinate with each swap execution facility and designated contract market that lists for trading a product that is cleared by the derivatives clearing organization, in developing rules and procedures to facilitate prompt and efficient processing of all contracts, agreements, and transactions submitted to the derivatives clearing organization for clearing.''). The CFTC reserved this rule section in its DCO Release but has not yet adopted the proposed rule as a final requirement.

[82] *See* CME Letter at 3; The DTCC (April) Letter at 6; The OCC Letter at 2.

[83] *See* The OCC Letter at 2.

[84] *See id.*

[85] *See* The OCC Letter at 3.

[86] *See id.*

[87] *See supra* Section II.B.

[88] *See Derivatives Clearing Organization General Provisions and Core Principles, supra* note 38.

[89] *See Financial Market Utilities, supra* note 25.

[90] *See* TriOptima Letter at 5; ICE Letter at 2.

[91] *See generally* TriOptima Letter; Markit (April) Letter; Markit (July) Letter; MarkitSERV (April) Letter; MarkitSERV (July) Letter; Omgeo Letter.

[92] *See supra* note 91 and accompanying text.

Section 3(a)(23)(A) of the Exchange Act covers any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities and provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities.[93] That view also is inconsistent with prior interpretive guidance from the Commission addressing the broader spectrum of activities that are associated with that term.[94] The determination of whether particular activities meet the definition of a clearing agency depends on the totality of the facts and circumstances involved.[95]

On July 1, 2011, the Commission published a conditional, temporary exemption from clearing agency registration for entities that perform certain post-trade processing services for security-based swap transactions.[96] The order facilitated the Commission's identification of entities that operate in that area and that accordingly may fall within the clearing agency definition. Several entities complied with the conditions of that order and remain exempt from clearing agency registration under its terms.[97] By allowing potential clearing agency registrants to elect temporary, conditional exemption from registration, the order has given the Commission more time to consider whether these entities meet the clearing agency definition and, if registration is required, to consider what form of regulation may be most appropriate for those services.

The Commission preliminarily agrees with commenters that it is appropriate to consider a tailored framework of regulation for clearing agencies that perform certain post-trade processing services because such activities do not involve the same credit, market and operational risk concerns that are presented by clearing agencies that perform CCP or CSD services.[98] Accordingly, the Commission intends to separately address clearing agencies that perform only post-trade processing services. The Commission has previously distinguished entities that provide certain post-trade services and fall within the definition of clearing agency from those entities that provide services more commonly associated with the functions of a clearing agency (*e.g.,* CCP and CSD services).[99] As part of its future rulemaking regarding these types of clearing agencies, the Commission may consider whether to apply the future rules to clearing agencies engaged in activities that were separately identified by Congress as PCS Activities in the Clearing Supervision Act. In particular, the Clearing Supervision Act identifies the following as PCS Activities:

(1) Calculation and communication of unsettled financial transactions between counterparties;

(2) netting of transactions;

(3) provision and maintenance of trade, contract, or instrument information;

(4) management of risks and activities associated with continuing financial transactions;

(5) transmittal and storage of payment instructions;

(6) movement of funds;

(7) final settlement of financial transactions; and

(8) other similar functions that the Council may determine.[100]

Accordingly, at this time, the Commission does not intend for Rule 17Ad–22 to apply to clearing agencies that perform post-trade processing services. The scope of Rule 17Ad–22 will be limited to clearing agencies that are registered with the Commission and the rule will not apply to any clearing agencies operating pursuant to an exemption from registration as a clearing agency granted by the Commission, unless the terms of future exemptions specifically contemplate its application, in whole or in part. The Commission has clarified this as part of the final Rule 17Ad–22 adopted today by adding the word ''registered'' before the term ''clearing agency'' appearing in the first instance in paragraphs (b), (c)(1), (c)(2), and (d). For this reason, references to the term ''clearing agency'' in this release are generally intended to capture only registered clearing agencies, unless the context suggests otherwise. The Commission may consider at a later time whether rules tailored to clearing agencies that provide post-trade processing services would be appropriate.

III. Description of Rule 17Ad–22

A. Overview and Scope

The Commission is adopting Rule 17Ad–22 with minor modifications from the proposal to implement the statutory provisions for clearing agencies under the Exchange Act. Rule 17Ad–22 requires registered clearing agencies to establish, implement, maintain and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis. These minimum requirements will work in tandem with the requirements in

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[93] *See supra* note 36.

[94] *See Confirmation and Affirmation of Securities Trades; Matching,* Exchange Act Release No. 34–39829 (Apr. 6, 1998), 63 FR 17943 (Apr. 13, 1998) (noting that ''[t]he Commission is of the view that matching constitutes a clearing agency function within the meaning of the clearing agency definition under Section 3(a)(23) of the Exchange Act. Specifically, matching constitutes 'comparison of data respecting the terms of settlement of securities transactions.'").

[95] *See, e.g., supra* note 1, at 91 (the Senate Committee on Banking, Housing and Urban affairs acknowledging that through the intended breadth of the clearing agency definition the Commission even retains authority ''to negate, by rule, exclusions in this category in order to assure the prompt and accurate clearance and settlement of securities transactions or to prevent evasions of the Exchange Act'').

[96] *See, e.g.,* Exchange Act Release No. 34–64796 (July 1, 2011), 76 FR 39963 (July 7, 2011) (providing an exemption from registration under Section 17A(b) of the Exchange Act, and stating that ''[t]he Commission is using its authority under section 36 of the Exchange Act to provide a conditional temporary exemption [from clearing agency registration], until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 71A(i) and (j) of the Exchange Act, from the registration requirement in Section 17A(b)(1) of the Exchange Act to any clearing agency that may be required to register with the Commission solely as a result of providing Collateral Management Services, Trade Matching Services, Tear Up and Compression Services, and/or substantially similar services for security-based swaps'').

[97] The Commission notes further that its adoption of Rule 17Ad–22 does not have any effect on the Commission's order granting a conditional temporary exemption from clearing agency registration for entities that perform certain post-trade processing services for security-based swap transactions. *See supra* note 96 and accompanying text. The temporary exemption is conditioned on these entities providing the Commission with identifying information and a detailed description of the types of services they provide. Section 17A(g) of the Exchange Act contains a registration requirement for security-based swaps clearing agencies. Section 17A(j) of the Exchange Act requires the Commission to adopt rules governing persons that are registered as clearing agencies for security-based swaps under the Exchange Act, and Section 17A(i) requires security-based swaps clearing agencies to comply with such standards as the Commission may establish by rule as a condition to being registered or maintaining registration. As the Commission previously indicated with respect to the effective date for Section 17A(g), if a Title VII provision requires a rulemaking, such provision will not go into effect ''not less than'' 60 days after publication of the final related rule. 76 FR 36287, 36302 (June 22, 2011). The Commission has not adopted any rules applicable to clearing agencies that perform services; therefore, the registration requirement of Section 17A(g) will not be applicable to such clearing agencies until the date when rules with respect to such clearing agencies are adopted pursuant to Section 17A(i).

[98] *See supra* notes 90–91 and accompanying text.

[99] *See, e.g.,* Exchange Act Order No. 34–44188 (Apr. 17, 2001) (providing an exemption from registration as a clearing agency to a subsidiary of Omgeo conducting electronic trade confirmation and matching services).

[100] 12 U.S.C. 5462(7).

Section 17A that the Commission must make certain determinations regarding a clearing agency's rules.

The Commission anticipates that the clearing agency's rules and procedures will likely continue to evolve so that the clearing agency can adequately respond to changes in technology, legal requirements, trading volume, trading practices, linkages between financial markets and the financial instruments traded in the markets that a clearing agency serves. Accordingly, registered clearing agencies must evaluate continually and make appropriate updates and improvements to their operations and risk management practices to facilitate the prompt and accurate clearance and settlement of securities transactions and to safeguard securities and funds in their custody or control.

Rule 17Ad–22 consists of the following parts: (1) Rule 17Ad–22(a) provides definitions for certain terms; (2) Rule 17Ad–22(b) contains risk management and participation requirements for registered CCPs; (3) Rule 17Ad–22(c) establishes a reporting requirement for registered clearing agencies with respect to certain matters including financial resources and methodologies used to calculate financial requirements; and (4) Rule 17Ad–22(d) requires registered clearing agencies, as applicable, to meet certain minimum standards.

As noted above, at this time, the Commission intends for Rule 17Ad–22 to apply only to registered clearing agencies. The Commission may consider at a later time whether any additional rules tailored to clearing agencies that perform post-trade processing services would be appropriate. In addition, Rule 17Ad–22 will not apply to any clearing agencies operating pursuant to an exemption from registration as a clearing agency granted by the Commission unless the terms of future exemptions specifically contemplate its application, in whole or in part.

B. Definitions—Rule 17Ad–22(a)

1. Proposed Rule

Proposed Rule 17Ad–22(a) contains five definitions. Proposed Rule 17Ad–22(a)(1) would define ''central counterparty'' as a clearing agency that interposes itself between counterparties to securities transactions to act functionally as the buyer to every seller and as the seller to every buyer. Proposed Rule 17Ad–22(a)(2) would define ''central securities depository services'' to mean services of a clearing agency that is a securities depository as described in Section 3(a)(23) of the Exchange Act.[101] Proposed Rule 17Ad–22(a)(3) would define ''participant,'' for the limited purposes of Rules 17Ad–22(b)(3) and 17Ad–22(d)(14), to mean that if a participant controls another participant, or is under common control with another participant, then the affiliated participants shall be collectively deemed to be a single participant. Proposed Rule 17Ad–22(a)(4) would define ''normal market conditions,'' for the limited purposes of Rules 17Ad–22(b)(1) and (2), to mean conditions in which the expected movement of the price of cleared securities would produce changes in a clearing agency's exposures to its participants that would be expected to breach margin requirements or other risk control mechanisms only one percent of the time.[102] Proposed Rule 17Ad–22(a)(5) would define ''net capital,'' for the limited purpose of Rule 17Ad–22(b)(7), to have the same meaning as set forth in Rule 15c3–1 under the Exchange Act for broker-dealers or any similar risk adjusted capital calculation for all other prospective clearing members.[103]

2. Comments Received

Commenters generally supported proposed Rule 17Ad–22(a)(3) because it would require a clearing agency to take account of an entire group of affiliated entities when complying with the financial resources requirements of proposed Rule 17Ad–22(b)(3), as well as the requirements in proposed Rule 17Ad–22(d)(14) for risk controls to address participants' failures to settle.[104] However, one commenter recommended that the rule employ the phrase ''participant family'' because ''participant'' on its own may be easily confused with other uses of that term in the Exchange Act and in the rules and regulations thereunder.[105] Accordingly, the commenter suggested that ''participant family'' should be defined to mean each participant that controls, is controlled by or is under common control with another participant.[106] The commenter recommended that the standard of control for this purpose should be defined as the disclosed ownership of 50% or more of the voting securities or other interests in a participant and that it should be based on information available to the clearing agency.[107]

One commenter expressed concern about the definition of ''normal market conditions'' as conditions in which the expected movement of the price of cleared securities would produce changes in a clearing agency's exposures to its participants that would be expected to breach margin requirements or other risk control mechanisms only one percent of the time.[108] The commenter argued that it would be unusual to define normal market conditions this way (*i.e.,* using margin requirements as a standard of measure) because margin models are designed to adjust during periods of market turbulence.[109]

The Commission received no comments on proposed Rules 17Ad–22(a)(1), (2) and (5).

3. Final Rule

As described more fully below, the Commission is adopting Rules 17Ad–22(a)(1), (2), (4) and (5) as proposed. We are also adopting Rule 17Ad–22(a)(3) with certain modifications to address concerns of commenters.

We agree with commenters who suggested that in the interest of clarity and to avoid confusion with use of the term ''participant'' elsewhere in Exchange Act regulations, Rule 17Ad–22(a)(3) should be modified so that the term defined by the rule is ''participant family'' instead of ''participant.'' We are also modifying Rule 17Ad–22(a)(3) with respect to the language that describes the test for determining when a sufficient relationship of control exists between participants to qualify them as a ''participant family.'' The definition has been expanded to include entities controlled by a participant and to cover direct and indirect relationships. Accordingly, Rule 17Ad–22(a)(3) now provides that participants will be deemed to be a ''participant family'' for purposes of Rules 17Ad–22(b)(3) and 17Ad–22(d)(14) when ''a participant directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another participant.'' This modification is intended to respond to the recommendation of commenters and more closely conform the text of Rule 17Ad–22(a)(3) to the language in which this standard appears in other contexts within the U.S. federal securities

[101] *See supra* note 36 and accompanying text.

[102] The definition of normal market conditions in Rule 17Ad–22(a)(4) is consistent with the corresponding explanation established in the CPSS–IOSCO Recommendations. *See* RCCP, *supra* note 33, at 21 (explanatory note number 1).

[103] As appropriate, the clearing agency may develop risk-adjusted capital calculations for prospective clearing members that are not broker-dealers.

[104] *See* The DTCC (April) Letter at 9–10.

[105] *See id.*

[106] *See* The DTCC (April) Letter at 10.

[107] *See id.*

[108] *See* The OCC Letter at 7.

[109] *See id.*

laws.[110] At the same time, we are not narrowing the definition of control in this context to mean ownership of 50% or more of the voting securities or other interests in a participant.[111] We believe the more appropriate evaluation of control is based on the relationship between the entities and the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. In conducting this evaluation, clearing agencies should also be guided by the definition of ''control'' set forth in Rule 405 under the Securities Act of 1933, using the information available to them.

The Commission agrees with the commenter that well-designed margin models include factors that adjust to periods of market turbulence. The Commission, however, is not persuaded by the argument that the definition of normal market conditions in Rule 17Ad–22(a)(4) is at odds with the concept of certain periods of market turbulence.[112] The rule defines ''normal market conditions'' as those that prevail 99 trading days out of 100. Margin models and other risk control mechanisms designed to adjust during periods of market turbulence are consistent with the definitional standard to the extent they help to reduce the number of trading days during which a clearing agency's exposure to participants are not fully covered by such measures.

The definition of ''normal market conditions'' in Rule 17Ad–22(a)(4) is also modeled on relevant and analogous international standards. The RCCP stipulates that a CCP should limit its exposures to potential losses from defaults by its participants in normal market conditions and defines ''normal market conditions'' as price movements that produce changes in exposures that are expected to breach margin requirements or other risk controls only 1% of the time.[113] The standard also comports with the international standard for bank capital requirements established by the Bank for International Settlements, which requires banks to measure market risks at a 99% confidence interval when determining regulatory capital requirements.[114]

C. Risk Management Requirements for Central Counterparties: Rules 17Ad–22(b)(1)–(4)

Rules 17Ad–22(b)(1)–(4) contain several requirements that address risk management practices by registered CCPs. Specifically, the proposed rules would create standards with respect to: (1) Measurement and management of credit exposures; (2) margin requirements; (3) financial resources; and (4) annual evaluations of the performance of the clearing agency's margin models.

During the comment period, commenters pointed out that to properly frame these requirements requires a great deal of technical expertise and that a failure to properly allow that expertise to influence final rules adopted by the Commission could result in inefficient requirements that lack the proper degree of flexibility to achieve prudent risk management practices without being overly burdensome. In some cases, commenters argued that personnel at the clearing agencies possess the requisite levels of experience and expertise to help the Commission shape CCP risk management standards.[115]

As an initial matter, the Commission believes that Rules 17Ad–22(b)(1)–(4) are appropriate minimum standards for registered CCPs and that they are consistent with existing international standards of practice. However, we agree that the process of evaluating, testing and refining CCP risk management standards will be ongoing and necessarily include an open dialogue among the CCPs, investors, the Commission and various other interested parties. In particular, the Commission will carefully consider further input from interested parties obtained through outreach to various constituencies and in response to any rules or rule amendments that may be proposed by the Commission upon considering the international standards developed by CPSS–IOSCO in the FMI Report.

Further, Rules 17Ad–22(b)(1), (2), and (3) establish targets for clearing agencies to meet without prescribing a particular method. Accordingly, the rules provide clearing agencies with the flexibility to establish risk management procedures (*e.g.*, back testing, stress testing, model validation procedures and the composition of financial resources) that are appropriately tailored to current market conditions and can be revised over time to address changes in market conditions. Given the existing use and general understanding by U.S. CCPs and CCPs and regulatory authorities around the world of the RCCP and the principles that form the basis of Rules 17Ad–22(b)(1), (2) and (3), the Commission is adopting these rules largely as proposed.

1. Rule 17Ad–22(b)(1): Measurement and Management of Credit Exposures

a. Proposed Rule

Proposed Rule 17Ad–22(b)(1), as proposed, would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to measure its credit exposures to its participants at least once each day, and limit its exposures to potential losses from defaults by its participants under normal market conditions [116] so that the operations of the CCP will not be disrupted and non-defaulting participants will not be exposed to losses that they cannot anticipate or control.

b. Comments Received

Three commenters urged the Commission to consider adopting a more prescriptive version of the rule.[117] Of this group, one suggested that the rule should permit a CCP to use correlated positions to reduce initial margin requirements only if the CCP can demonstrate a robust correlation between those positions under stressed market conditions and the CCP publicly discloses its methodology periodically for determining the correlation and the CCP's resulting margin requirements.[118] Another commenter suggested that a CCP should be required to measure credit exposures several times each business day and to recalculate initial and variation margin for each clearing member and the clearing member's clients more than once each day.[119] The third commenter stated that Rule 17Ad–22(b)(1) should also require the CCP to perform intraday calculations of credit risk exposure when circumstances warrant, including situations where the security-based swap is illiquid, difficult to price, or highly volatile.[120]

[110] *See, e.g.,* 17 CFR 230.405 (using ''controls or is controlled by, or is under common control with'' in the definition of affiliate found in Rule 405 under the Securities Act of 1933).

[111] *See supra* note 107 and accompanying text.

[112] The Commission notes that the definition of normal market conditions found in Rule 17Ad–22(a) is modeled on the current international standard for determining normal market conditions in the CPSS–IOSCO Recommendations.

[113] *See* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Recommendations for Central Counterparties* (Nov. 2004), at 18–21, *available at http://www.bis.org/publ/cpss64.pdf.*

[114] *See infra* Section V.B.2 (discussion on current industry practices).

[115] *See* The DTCC (April) Letter at 18–20; The OCC Letter at 12; LCH Letter at 3–4.

[116] *See supra* note 102 and accompanying text.

[117] *See* ISDA Letter at 7; LCH Letter at 2; Better Markets Letter at 5.

[118] *See* ISDA Letter at 7.

[119] *See* LCH Letter at 2.

[120] *See* Better Markets Letter at 5.

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(1) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We agree with commenters that the risks CCPs face are subject to change over time due to the potential for significant changes in the risk profiles of participants and if those risks are not appropriately measured and managed by the CCP, they can result in the accrual of significant liabilities.[121] The Commission believes that measuring credit exposures once each day is the minimum frequency of measurement that will permit a clearing agency to consider effectively the credit exposures it faces.

The Commission agrees with commenters that clearing agencies may need to measure credit exposures more frequently than once each day in order to ensure that the CCP can facilitate the prompt and accurate clearance and settlement of securities transactions and ensure that they operate safely and efficiently. That point of view is reflected in the rule requirement that the measurement must be performed at least once each day. However, the Commission believes that a less prescriptive and more flexible rule sets a more appropriate baseline standard. Each CCP is exposed to participants in different markets characterized by different trading patterns, volumes, liquidity, transparency and other unique market characteristics. Rather than prescribing a specific frequency for risk exposure measurements (other than the once daily minimum), the Commission believes that CCPs should monitor exposure and margin coverage on an intraday basis depending on the individual risk characteristics of their members and businesses, and adjust their risk management processes as needed. This stance is also consistent with our understanding that the practice at many CCPs is to measure credit exposures more than once daily.[122]

While the Commission also agrees with commenters who expressed the view that a CCP should provide reductions in initial margin requirements based on offsetting or inversely correlated positions only if the CCP can demonstrate a robust correlation between those positions—including under stressed market conditions,[123] the rule is being adopted as proposed. The Commission believes that the determination of whether positions are sufficiently correlated to warrant offsets or whether reductions should be provided at all, is a matter that should be determined by the CCP as it implements its risk management procedures, and submitted to the Commission for review and public comment, as part of the Section 19b–4 rule filing process. The Commission believes that the rule should allow each CCP the flexibility to set margin requirements based on the unique products and markets that it serves. Margin requirements will vary based on a number of factors, including, but not limited to, the type, volume, and volatility of the instruments cleared. It is difficult to make determinations at the rule level regarding the suitability of margin reductions based on adequate position correlations; therefore, the Commission believes it is more appropriate to conduct such methodological evaluations during the supervisory process.

As adopted, Rule 17Ad–22(b)(1) does not require that a registered CCP publicly disclose its correlation methodology and related margin requirements.[124] Correlation methodology is generally considered confidential by clearing agencies because it is a critical element in determining their margin requirements. While CCPs generally provide this type of information to their participants, it typically is not made public. In this connection, we are adopting Rule 17Ad–22(d)(9), discussed below, which requires each registered CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide market participants with sufficient information to enable them to identify and evaluate the risks and costs associated with using its services. Rule 17Ad–22(d)(9) is intended in part to promote appropriate levels of transparency concerning a CCP's margin practices while allowing registered clearing agencies to tailor disclosure in a way that preserves incentives for business model innovations and responsible competition among clearing agencies.

We are also adopting Rule 17Ad–22(b)(1), as it was proposed, to require registered CCPs to establish, implement, maintain, and enforce written policies and procedures reasonably designed to limit their exposures to potential losses from participant defaults. By collecting sufficient margin and having other liquid resources at its disposal, the Commission expects that a clearing agency will be able to limit its exposures to potential losses from defaults by clearing members in normal market conditions.[125]

2. Rule 17Ad–22(b)(2): Margin Requirements

a. Proposed Rule

Proposed Rule 17Ad–22(b)(2) would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to: (i) Use margin requirements to limit its credit exposures to participants under normal market conditions; [126] (ii) use risk-based models to set margin requirements; and (iii) review the models at least monthly.

b. Comments Received

One commenter recommended that the rule be amended to require that the CCP's margin requirements must be sufficient to limit credit exposures to both the CCP's participants and the clients of the CCP's participants.[127] Another commenter supported standardization of the way CCPs set margin requirements and stated that the final rule should require those clearing agencies to make their margin-setting methodology available to customers.[128] The commenter argued that this disclosure would enable market participants to reasonably anticipate when additional margin may be required and would consequently promote stable liquidity in the marketplace.[129]

In response to a question asked by the Commission in the Proposing Release, one commenter stated that adopting Rule 17Ad–22(b)(2) as proposed is unlikely to create the risk that CCPs will lower margin standards to compete for business.[130] The commenter asserted that integrity in risk management is the primary focus of CCPs, and that a CCP would suffer severe reputational harm if it risked using guaranty fund resources to cover margin deficiencies of clearing members.[131] In addition, according to the commenter, CCPs do not alter margin requirements based on the

[121] *See supra* notes 119–120 (citing the Better Markets Letter and LCH Letter).

[122] *See id.*

[123] *See supra* note 118 and accompanying text.

[124] *See* The OCC Letter at 17; The DTCC (April) Letter at 7.

[125] *See supra* note 102 and accompanying text.

[126] *See id.*

[127] *See* LCH Letter at 2.

[128] *See* MFA (Kaswell) Letter at 2.

[129] *See id.* (noting that if the Commission requires the creation of these transparent conditions with respect to margin in its final rules, then the commenter would fully support the ability of clearing agencies to have flexibility to modify margin requirements as necessary, including by imposing special margin requirements or requiring intraday posting of margin).

[130] *See id.*

[131] *See id.*

identity of the individual counterparty.[132]

One commenter contended that certain aspects of a CCP's margin methodology, such as choice of confidence levels (used to estimate expected shortfall), the number of days' data relied on, and the various weights used to determine stress test charges do not need to be reviewed on a monthly basis.[133] If the final rule does require a monthly review, the commenter suggested that the Commission should make clear that CCPs have substantial discretion to determine which aspects of the model are appropriate for the monthly review.[134] In contrast, another commenter asked the Commission to consider a more prescriptive approach to the rule. It suggested that Rule 17Ad–22(b)(2) should be modified to require a clearing agency to use two to three years of historical price data when establishing normal market conditions, consider liquidity and the amount of time necessary to replace a position once a default occurs, and make a showing of significant and reliable correlation of price risks before it is allowed to net initial margin using long and short positions.[135]

One commenter focused more narrowly on the appropriate confidence level that should be applied to initial margin collected by a clearing agency.[136] The commenter argued that setting the appropriate confidence level is directly tied to the degree of mutualization performed by a clearing agency (*i.e.,* the lesser the degree of mutualization the higher the appropriate confidence level because the amount of funds available to manage a default will be reduced).[137]

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(2) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. This requirement recognizes that the collection of assets (*e.g.,* cash or securities) from participants provides the clearing agency with assets to limit its exposure to a participant in the event of a participant default. By limiting its credit exposure in this manner, a CCP is less likely to be subject to disruptions in its operations as a result of a participant default, thereby facilitating the prompt and accurate clearance and settlement of securities transactions.

The Commission does not believe it is necessary to amend the rule to state that a registered CCP's margin requirements must limit credit exposures to customers of participants as well as participants.[138] Margin requirements applicable to a customer's securities positions are established in accordance with regulations specifically governing customer margin practices [139] and in some cases through additional margin requirements imposed by the participant to address its credit risk to the customer. As a result, even when a participant is transacting on the behalf of a customer, the CCP enters into a transaction only with the participant, and therefore it is the participant's creditworthiness that the clearing agency's margin requirements must adequately address.

The Commission is aware that some CCPs may already have the ability to measure credit exposures to customers of participants as well as to participants. To the extent that such margin practices are already in place or develop over time to help ensure prompt and accurate clearance and settlement in the market the clearing agency serves, we believe those practices can be effective in limiting aggregate credit exposures of clearing agencies. We agree that the ability to limit credit exposures to customers of participants using margin may help inform and shape appropriate credit risk management practices in certain cases—for example, where (i) direct access to a clearing agency by some participants may be relatively more constrained by the operational or financial demands commensurate with participation; (ii) open interest periods associated with the instruments cleared by the clearing agency are relatively significant; or (iii) customer margin requirements are established independently from the CCP (*e.g.,* pursuant to regulation or by agreement with a participant). However, we believe that, at this time, individual CCPs should develop rules and procedures to address these specific circumstances consistent with their general responsibilities as clearing agencies under the Exchange Act and that rules of this kind would be subject to the rule filing procedures of Section 19b–4.

The Commission is not amending Rule 17Ad–22(b)(2) to specify which aspects or components of the CCP's risk-based models must be reviewed in the context of the CCP's monthly review.[140] The Commission recognizes that some assumptions that underlie model parameters may be widely accepted by current convention, and those components therefore may be less likely to become outdated from month to month. On the other hand, the Commission notes that market conditions and risks are constantly changing and CCPs will need to exercise discretion in how they administer their review of those components.

The Commission notes that, to the extent a CCP believes that an assumption in a model or parameter does not lend itself to empirical testing, a review of that assumption can in some cases be accomplished by the CCP performing a theoretical assessment of that assumption compared to alternative assumptions. For example, a CCP may evaluate the appropriateness of the number of days of market data used in its margin model or the expected amount of time needed to liquidate a security in an event of default by comparing the performance of the margin model when a range of representative values is input.

Also consistent with the intent of preserving appropriate flexibility for clearing agencies to tailor their methods of achieving compliance, the Commission is not prescribing a particular confidence level for initial margin in Rule 17Ad–22(b)(2).[141] Rather, subject to Commission oversight, Rule 17Ad–22(b)(2) allows a confidence level determination to be made by the clearing agency as part of the development of its margin parameters and risk-based models. In arriving at an appropriate confidence level, we agree with commenters that the extent of mutualization of financial resources performed by a CCP in its risk management practices and the particular use of individualized client accounts or an omnibus account structure are appropriate factors to consider.[142] The Commission also chose not to stipulate specific requirements pertaining to the scope of historical price data, liquidity and replacement considerations, and the correlation of price risks used in calculating margin requirements, again opting for a more flexible standard. While a clearing

[132] *See* MFA (Kaswell) Letter at 2–3.

[133] *See* The OCC Letter at 7.

[134] *See id.*

[135] *See* Better Markets Letter at 3–4.

[136] *See* ISDA Letter at 7.

[137] *See id.* (stating, for example, that if the clearing agency performs mutualization in its default fund and for clients in omnibus client accounts then a 99% confidence level is completely appropriate. By contrast, if the clearing agency imposes a requirement for individualized client accounts instead of an omnibus account, then the commenter believes that a confidence level greater than 99% is likely appropriate).

[138] *See supra* note 127 and accompanying text.

[139] *See, e.g.,* 17 CFR 240.15c3–3 (Customer protection—reserves and custody of securities and Regulation T, 12 CFR 220).

[140] *See supra* note 134 and accompanying text.

[141] *See supra* note 136 and accompanying text.

[142] *See supra* note 137 and accompanying text.

agency may take such factors into consideration when determining margin requirements, each registered CCP should be free to develop the best margin methodology to accommodate its unique products and markets. Accordingly, the Commission believes that it should not attempt to prescribe the appropriate margin methodologies for each CCP or financial instrument.[143]

We agree with commenters who asserted that a CCP's disclosure of its margin-setting methodology to customers facilitates prompt and accurate clearance and settlement by enabling market participants to better plan for margin costs associated with the use of the clearing agency.[144] As noted above, registered CCPs must submit their risk management procedures, including margin methodology, to the Commission for review and public comment as a proposed rule change under Rule 19b–4. The Rule 19b–4 process provides for public disclosure, as well as an opportunity for interested parties to comment on the proposed rule change. In addition, the Commission believes that any reasonable process for implementing risk management practices will involve further, more detailed communication with clearing members and their customers regarding the particular expected results of the practices in identified circumstances. Such communication may involve both direct contacts with members and their customers or indirect contacts through general information published by the CCP on its Web site or in other generally available resources.

3. Rule 17Ad–22(b)(3): Financial Resources

a. Proposed Rule

Proposed Rule 17Ad–22(b)(3) would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain sufficient financial resources to withstand, at a minimum, a default by the participant to which it has the largest exposure in extreme but plausible market conditions, provided that a security-based swap clearing agency would be required to maintain sufficient financial resources to withstand, at a minimum, a default by the two participants (also referred to as the ''cover two'' standard) to which it has the largest exposures in extreme but plausible market conditions.[145]

b. Comments Received

Commenters expressed a wide range of views concerning proposed Rule 17Ad–22(b)(3). Some commenters generally supported the proposed rule.[146] Others expressed concern that the introduction of two different financial resources standards may discourage CCPs from extending their services to security-based swaps or may discourage prospective participants from seeking membership in CCPs for security-based swaps, which would disrupt the goal of the Dodd-Frank Act to promote central clearing.[147] One commenter stated its opinion that no historical or empirical case has been made for changing the way that CCPs currently measure the sufficiency of their financial resources and that no cost-benefit analysis has been done on the impact of any such change on the operations and economics of CCPs.[148]

A commenter also suggested that CCPs should consider the simultaneous default of multiple clearing members when sizing their financial resources but that a simultaneous default of the two largest clearing members is an extremely implausible occurrence, and accordingly it is not a scenario that should be embedded as a fixed requirement in the Commission's rules.[149] That commenter stated that it is reasonable to assume a default by the two largest participants would take place in conditions of heightened market volatility, which would cause a CCP to collect more financial resources because of the risk-based nature of margin requirements.[150]

One commenter disagreed with assertions in the Proposing Release that the performance of CCP services for security-based swaps entails risks that are unique to those products and that those unique risks support the proposed ''cover two'' requirement.[151] The commenter also stated that accounting for the jump-to-default risk of certain security-based swap instruments (*i.e.,* credit-default swaps) should be addressed through calculation of financial resource requirements using more extreme market scenarios instead of adjusting the number of participant defaults.[152] The commenter urged the Commission to consider how changes taking place to the infrastructure and risk management practices in the securities markets due to the Dodd-Frank Act may render irrelevant certain risks that are associated with security-based swaps today.[153]

Commenters supported the position that the Commission's regulatory standards for CCPs should be modified where appropriate to account for the relevant work of international standard setters such as the CPSS and IOSCO.[154] However, commenters pointed out that a ''cover two'' standard would be inconsistent with the existing CPSS–IOSCO Recommendations for financial resources.[155] They also urged the Commission not to require any CCP to increase its liquidity resources or otherwise re-engineer its risk management controls unless and until there is industry and regulatory consensus on the changes that should be made.[156] These commenters encouraged the Commission to ensure that its final rulemakings are aligned with the existing CPSS–IOSCO Recommendations to the closest extent possible.[157]

Commenters disagreed over what role the Commission should play in defining the term ''extreme but plausible market conditions'' as that term appears in proposed Rule 17Ad–22(b)(3).[158] One commenter favored a significant role for

[143] *See* Section 17A discussion *supra* Section I.A.2 and accompanying text.

[144] *See supra* note 59.

[145] *See* proposed Rule 17Ad–22(a)(3), *supra* Section III.B.1 (defining ''participant'' for purposes of proposed Rule 17Ad–22(b)(3)).

[146] *See* Better Markets Letter at 5 (supporting the rule and stating that it appropriately differentiates between security-based swap and non security-based swap clearing agencies due to unique features of the security-based swap markets, such as jump-to-default risk); *see also* Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed Rule 17Ad–22 concerning standards for clearing agencies); BlackRock Letter at 2 (supporting Rules 17Ad–22(b)(1)–(7) because these rules will benefit the markets by reducing concentration risk, increasing the diversity of market participants involved in governance, enhancing competition and lowering costs for customers of clearing members); MFA (Kaswell) Letter at 2 (generally supporting the rules proposed under 17Ad–22(b) because they would establish reasonable, objective, risk-based criteria for fair and open access).

[147] *See* LCH Letter at 2; The OCC Letter at 9.

[148] *See* The DTCC (April) Letter at 12.

[149] *See* The OCC Letter at 8.

[150] *See* The OCC Letter at 9.

[151] *See* The OCC Letter at 8 (expressing by way of example that a total return security-based swap on a single underlying security of a company that has a large market capitalization is a lower risk management challenge for a clearing agency that performs CCP services than a put or a call option on the same underlying security. It expressed a belief that the risk is much the same as a security future on the same underlying).

[152] *See id.*

[153] *See id.*

[154] *See* The OCC Letter at 9 (citing CPSS–IOSCO Recommendation for Central Counterparties, Recommendation 3).

[155] *See id.*

[156] *See* The DTCC (April) Letter at 12.

[157] *See* LCH Letter at 2–3; The OCC Letter at 9.

[158] *See* Better Markets Letter at 5–6; The DTCC (April) Letter at 10.

the Commission.[159] Other commenters agreed that CCPs should be primarily responsible for determining the parameters of the standard because of their unique access to market data and understanding of the range of applicable market conditions.[160] Those commenters stated that Rule 17Ad–22(b)(3) should clarify that a CCP is responsible for determining what constitutes ''extreme but plausible market conditions.''

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(3) with certain modifications to address concerns raised by commenters, including but not limited to the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies and clarifications relating to the term ''participant family'' as discussed above.[161] The Commission believes that requiring a registered CCP, other than a security-based swap CCP, to maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions, reduces the likelihood that a default would create losses that disrupt the operations of the CCP and adversely affect the clearing agency's non-defaulting participants.

While the Commission is sensitive to the consequences of establishing a different standard for CCPs that clear security-based swaps, the Commission believes that the financial resources of the entity must be robust enough to accommodate the risks that are particular to each market served—irrespective of whether such analysis results in different standards. The Commission believes that requiring a security-based swap CCP to cover its two largest potential exposures is the appropriate standard due to the nature of these products. Security-based swaps pose unique risk management issues. In particular, credit default swaps, a subset of security-based swaps, are non-linear financial instruments subject to additional risk factors such as jump-to-default risk[162] and asymmetrical risk allocation between short and long counterparties. Unlike other products that also exhibit these characteristics (*e.g.,* Long-Term Equity Anticipation Securities (LEAPS)), credit default swaps are unique in their size relative to their underlying markets. Recent research shows that notional outstandings in credit default swaps are often close to or greater than the outstanding value of the underlying instruments.[163] The traditional procedures for a clearing agency to handle a default may not be effective and may entail significant risk to a CCP clearing security-based swaps.[164] To address this concern, CCPs have implemented procedures that provide for the management and oversight of the liquidation or transfer of the defaulting member's positions by a default management committee comprising senior CCP staff and representatives from member institutions.[165]

The Commission does not believe that changes in the security-based swap market resulting from the Dodd-Frank Act (*e.g.,* mandatory clearing requirements, the establishment of the Council, *etc.*) have eliminated or will eliminate the additional risk management challenges of security-based swaps noted above. Therefore, the Commission believes that it should codify the existing standard for maintenance of financial resources established by CCPs currently clearing security-based swaps.

The Commission notes that current industry participants recognize the need for more stringent financial resource requirements for CCPs that clear credit default swaps.[166] This point is evidenced by the fact that the ''cover two'' standard has been employed since before the enactment of the Dodd-Frank Act and prior to the adoption of the European Market Infrastructure Regulation (''EMIR'')[167] by the major CCPs clearing credit default swaps, both in the United States and internationally. For example, both of the registered CCPs providing clearing services for credit default swap transactions to customers in the United States, ICE Clear Credit and ICE Clear Europe, already meet a ''cover two'' standard as does CME Group (''CME'') with respect to its clearing service for index credit default swaps, which is registered with the Commission but does not yet provide CCP services for security-based swaps.[168] LCH.Clearnet, a leading CCP

[159] *See* Better Markets Letter at 5–6 (stressing that the Commission should provide concrete guidance on the meaning of ''extreme but plausible market conditions'' to prevent lax or self-serving interpretation of that standard and to promote consistent practices among clearing agencies that will prevent the adoption of lower standards designed to reduce costs and attract business volume at the expense of stability and risk mitigation. The commenter also expressed that the Commission's definition of the standard should focus on unprecedented periods of illiquidity, volatility and interconnectedness that lead to multiple defaults).

[160] *See* The DTCC (April) Letter at 10; The OCC Letter at 10.

[161] *See supra* note 146 (supporting the rule as proposed); *see also supra* section III.B.3 (discussing the term ''participant family'').

[162] Jump-to-default risk refers to the expected change in the value of a CDS contract if a credit event were to occur with respect to a reference entity under the terms of the CDS contract, triggering an obligation for the seller of protection under the contract to make a lump sum payment to the protection buyer. Jump-to-default only refers to the incremental information in the determination that a credit event has occurred because the market already prices the probability of a credit event. In practice, credit events are largely anticipated such that jump-to-default results in small changes in value as opposed to a first order pricing effect. Jump-to-default risk exists for all CDS, not merely those on reference entities perceived as risk credits. While the decline in contract value from a credit event is usually bigger for creditworthy reference entities (because the initial contract value is higher and thus has farther to fall), jump-to-default risk can also be measured for distressed reference entities that are expected to suffer a credit event in the near future. As a hypothetical example, market participants might have measured the jump-to-default risk in ''Hypothetical Risky Corporation'' five-year CDS when the CDS was trading at 70% upfront (that is, a seller would need to receive an up-front payment of 70% of notional value to write the contract) and the expected value in default was 80% upfront (implying a 20% recovery rate) as being equal to 10% of notional value; equally, they might have measured the jump-to-default risk of ''Hypothetical Safe Corporation'' five-year CDS when it was trading at 0.30% per annum and no up-front payment (roughly equivalent to an up-front payment of 1.5%) with an expected value in default of 60% upfront (implying a 40% recovery rate) as being equal to approximately 58.5% of notional value. *See generally* Darrell Duffie and Haoxiang Zhu, *Does a Central Clearing Counterparty Reduce Counterparty Risk?* (Stanford Univ. 2010), *available at http://www.stanford.edu/~duffie/DuffieZhu.pdf.*

[163] *See, e.g.,* Stavros Peristiani, Vanessa Savino, ''Are Credit Default Swaps Associated with Higher Corporate Defaults?'', Federal Reserve Bank of New York Staff Report No. 494 (May 2011); Alessandro Fontana and Martin Scheicher, ''An analysis of euro area sovereign CDS and their relation with government bonds,'' European Central Bank Working Paper Series, No. 1271 (Dec. 2010).

[164] For example, when a participant defaults, the CCP terminates all of its contracts with the defaulting participant. The traditional procedures for handling a default, which are used by CCPs for most exchange-traded derivatives, call for the CCP to promptly enter the market and replace the contracts, so as to hedge against further losses on the open positions created by termination of the defaulter's contracts. However, if the markets for the contracts cleared by the CCP are illiquid, entering the market may induce adverse price movements, especially if the defaulting participant's positions are large relative to the overall market for the contracts. *See* Bank for International Settlement's Committee on Payment and Settlement Systems, *New Developments in Clearing and Settlement Arrangements for OTC Derivatives* (Mar. 2007).

[165] *See id.*

[166] *See, e.g.,* ISDA Letter at 1; *see also* Letter to William C. Dudley from the OTC Derivatives Supervisors Group, dated March 31, 2011, *available at http://www.newyorkfed.org/newsevents/news/markets/2011/SCL0331/pdf* (generally supporting enhancing the framework for OTC derivatives risk management).

[167] Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, 2012 O.J. (L 201).

[168] *See* CFTC–SEC Staff Roundtable on Clearing of Credit Default Swaps (Oct. 2010), at 123, *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/*

for OTC derivatives in Europe, maintains a ''cover two'' standard for its credit default swap CCP activities.[169] These practices are consistent with the ''cover two'' financial resources requirement for European CCPs contained in EMIR.[170]

Given that both of the registered CCPs providing clearing services for security-based swap transactions already meet the proposed standard, and that CME, which proposes to provide such services, is currently following a ''cover two'' standard in index credit default swap clearing, the Commission believes that Rule 17Ad–22(b)(3) does not represent a change in existing market practices and would not hinder the growth of existing security-based swap CCPs.[171] Furthermore, the Commission does not believe the rule poses an overly burdensome barrier to entry for future CCPs wishing to clear security-based swaps, as we do not intend the rule to require a registered CCP clearing security-based swaps to cover its two largest participant exposures in the event of default for all of its products. A CCP can choose to maintain a separate default fund for security-based swaps, limiting the overall financial burden.[172]

We are adopting Rule 17Ad–22(b)(3) with modifications intended to recognize different types of structures currently employed by CCPs clearing security-based swaps and similar structures that may be developed in the future. The final rule allows that the policies and procedures may provide that the additional financial resources required to be held under the ''cover two'' standard may be maintained for the entire CCP or in separately maintained funds. This modification from the proposal recognizes that clearing agencies' practices may be structured as (i) conducting security-based swap clearing activities in a separate legal entity or (ii) maintaining within one legal entity separate rules, membership requirements, risk management practices, and financial resources specifically designed to cover the CCP's exposures to a separate pool of instruments that includes security-based swaps. The Commission also believes that as security-based swap CCPs introduce new products for clearing on an incremental basis in the future, the adopted rule will provide them with appropriate flexibility to organize their operations to obtain additional financial resources to cover exposures for each new security-based swap product in the manner most appropriate for their organization.[173]

Some commenters argued that the Commission should not adopt a standard for the level of financial resources that may be inconsistent with the FMI Report and that there should be industry and regulatory consensus on the level of financial resources that must be maintained.[174] The FMI Report states that CCPs should maintain financial resources to cover the default of the largest two participants when the CCP is involved in activities with a more-complex risk profile.[175] The FMI Report describes a more-complex risk profile as ''clearing financial instruments that are characterized by discreet jump-to-default price changes or that are highly correlated with potential participant defaults.'' [176] The vast majority of security-based swaps by notional value and other measures are credit default swaps products with such characteristics, and, accordingly, the Commission believes that the standard being adopted today with regard to security-based swaps is substantially similar to that in the FMI Report.[177] As security-based swap products with different characteristics are proposed for clearing over time, the Commission would evaluate risk profiles of such products to consider how they would be treated under the ''cover two'' standard.

The Commission also is not persuaded that the ''cover two'' standard reflects an implausible occurrence that therefore should not be embedded into the Commission's rules. The financial crisis of 2008 demonstrated the plausibility of the default of two large participants in a clearing agency over a brief period. One large investment bank was saved from the brink of default in March 2008.[178] In September 2008, two large financial institutions failed and another large financial institution was rescued from insolvency by the Federal Reserve.[179] Throughout the course of these events, the U.S. and world financial markets were affected by a systemic crisis of confidence that stifled the ability of market participants to obtain financing and avoid default.[180] The Commission believes therefore that it is plausible to

dfsubmission7_102210-transcrip.pdf (Stan Ivanov, ICE Clear Credit stating ''at ICE we look at two simultaneous defaults of the two biggest losers upon extreme conditions * * *.''). *See also* CDS Clearing Solution ICE Clear Europe (June 2012), at 6, *available at https://www.theice.com/publicdocs/clear_europe/ICE_Clear_Europe_CDS_Clearing_Overview.pdf* (''Guaranty Fund covers simultaneous default of 2 largest Clearing Members''); CME Rulebook, Chapter 8H, Rule 8H07, *available at http://www.cmegroup.com/rulebook/CME/I/8H/07.html.*

[169] *See LCH.Clearnet CDS Clearing Rulebook,* Chapter 4, Article 4.4.1.2 (May 5, 2012), *available at http://www.lchclearnet.com/Images/CDSClear%20Rulebook_tcm6-61343.pdf.*

[170] *See supra* note 167, at 43.

[171] *See supra* note 168.

[172] *See CME Rulebook,* Chapter 8, Rule 802, *available at http://www.cmegroup.com/rulebook/CME/I/8/02.html* (''The Clearing House shall establish a guaranty fund (the ''Base Guaranty Fund'') for products other than CDS Products * * *''); *see also* CME Rulebook, Chapter 8H, Rule 8H07, *available at http://www.cmegroup.com/rulebook/CME/I/8H/07.html* (''The Clearing House shall establish a financial safeguards package to support CDS clearing, and each CDS Clearing Member shall make a CDS Guaranty Fund deposit with the Clearing House.''); *see generally* discussion *infra* Section V.B.1.iii.c.

[173] The Commission is also aware that clearing agencies that provide CCP services for security-based swap transactions generally do not separate their operations and risk management practices between swap and security-based swap instruments. For example, we understand that some registered clearing agencies may wish to accept customer assets used to margin customer positions consisting of swaps and security-based swaps in commingled customer omnibus accounts and are already offering clearing services for swaps and security-based swaps in commingled proprietary accounts. Accordingly, where a clearing agency's operations and risk management practices are commingled, the clearing agency will be subject to the ''cover two'' requirement applicable to security-based swap CCPs under Rule 17Ad–22(b)(3). *See* Letter from Winston & Strawn LLP, dated Nov. 7, 2011 (requesting exemptive relief for ICE Clear Credit LLC in connection with a program to commingle customer funds and implement portfolio CDS).

[174] *See supra* note 156.

[175] *See FMI Report, supra* note 32, at 36 (Principle 4: Credit risk ''In addition, a CCP that is involved in activities with a more-complex risk profile or that is systemically important in multiple jurisdictions should maintain additional financial resources sufficient to cover a wide range of potential stress scenarios that should include, but not be limited to, the default of the two participants and their affiliates that would potentially cause the largest aggregate credit exposure to the CCP in extreme but plausible market conditions. All other CCPs should maintain additional financial resources sufficient to cover a wide range of potential stress scenarios that should include, but not be limited to, the default of the participant and its affiliates that would potentially cause the largest aggregate credit exposure to the CCP in extreme but plausible market conditions.'').

[176] *See id.*

[177] The Commission has previously estimated that single-name CDS will constitute roughly 95% of the market, as measured on a notional basis, for instruments that fall within the definition of security-based swap. *See* Securities Exchange Act Release No. 34–66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012), at 30636, n.476.

[178] *See* Board of Governors of the Federal Reserve System, *Bear Stearns, JPMorgan Chase, and Maiden Lane LLC, http://www.federalreserve.gov/newsevents/reform_bearstearns.htm* (last visited June 25, 2012).

[179] LaBonte and Norden Berg, Dodd-Frank Act, Congressional Research Services, *Title VIII: Supervision of Payment, Clearing and Settlement Activities* (Dec. 10, 2010), at 1, *available at http://www.llsdc.org/attachments/files/279/CRS-R41529.pdf* (noting the failures of Lehman Brothers Holdings, Inc. and Washington Mutual, Inc. in 2008 and the subsequent rescue of American International Group, Inc.).

[180] *See, e.g., Trustee's Preliminary Investigation Report and Recommendations of the Attorneys for James W. Giddens for the SIPA Liquidation of Lehman Brothers, Inc.* (Aug. 25, 2010), *available at http://dm.epiq11.com/LBI/Project/default.aspx.*

assume that a systemic market disruption like that which was experienced in 2008 could affect the two largest participants of a security-based swap CCP.

One clearing agency commented that since its modeling assumptions for simultaneous default of two participants assume significant market volatility but its modeling assumptions for the default of the largest participant assume low volatility, it is possible that a requirement for financial resources to cover the default of the largest two participants may result in only a slightly higher or even a lower requirement than one for financial resources to cover the default of the largest participant.[181] However, the Commission is not persuaded by this comment and the assumption regarding low volatility. All registered clearing agencies are expected to ensure that the assumptions underlying their models are reasonably designed to meet the requirements of the Exchange Act and related regulations at all times, and the Commission staff reviews the practices of clearing agencies in this area through its established supervisory process. To the extent Commission staff identifies shortcomings in an individual registered clearing agency's practices relevant to its maintenance of the ''cover one'' or ''cover two'' requirements, further action may be taken to address such concerns, as may be necessary or appropriate. For example, in connection with an examination, the Commission can request corrective action as part of its examination findings. Where there are shortcomings that violate the clearing agency's rules or Rule 17Ad–22(b)(3), the Commission may take enforcement action.[182]

Finally, the Commission does not believe that Rule 17Ad–22(b)(3) will require major changes to the practices that have been developed to measure the sufficiency of financial resources at registered CCPs. The Commission understands that all CCPs currently registered with the Commission maintain enough financial resources to withstand the default of their largest participant under extreme but plausible market conditions.[183] All of the security-based swap transactions that are centrally cleared in the United States are handled by a security-based swap CCP that maintains enough financial resources to be able to withstand the default of its two largest participants.[184]

The Commission agrees with the commenter who suggested that it is important for the Commission to provide concrete guidance regarding the meaning of ''extreme but plausible market conditions'' to assure consistent treatment of that term across clearing CCPs. In general, ''extreme but plausible market conditions'' are tail event conditions in which the price movement of a cleared security results in losses exceeding expectations at a 99% confidence interval, causing a clearing agency's exposures to its participants to breach margin requirements or other risk controls (*i.e.,* a one out of 100 days scenario). For example, ''extreme but plausible market conditions'' may include or exceed the worst historical price movement for a particular financial instrument over a specified time horizon. However, the Commission also agrees with commenters that argued that industry professionals, including but not limited to personnel at the clearing agencies themselves, are likely to be equipped with the relevant expertise that can contribute to developing a well-informed standard of ''extreme but plausible market conditions.'' To ensure that the standard is consistently applied across CCPs and that it accurately captures the market understanding of the terminology, the Commission expects to review and publish for public comment rule proposals from clearing agencies adopting a definition for ''extreme but plausible market conditions'' that is appropriate for the market they serve.

4. Rule 17Ad–22(b)(4): Model Validation

a. Proposed Rule

Rule 17Ad–22(b)(4), as proposed, would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for an annual model validation process consisting of evaluating the performance of the CCP's margin models and the related parameters and assumptions associated with such models by a qualified person who does not perform functions associated with the clearing agency's margin models (except as part of the annual model validation) and does not report to a person who performs these functions.[185] The Commission is adopting Rule 17Ad–22(b)(4) to ensure that a registered CCP's models are validated by qualified persons free from influence from the persons responsible for development or operation of the systems and models being validated, with sufficient frequency to assure that the models perform in a manner that facilitates prompt and accurate clearance and settlement of transactions.

b. Comments Received

Commenters generally supported proposed Rule 17Ad–22(b)(4)[186] but

[181] *See supra* note 150.

[182] *See* Section 17A discussion *supra* Section I.A.2 and accompanying text.

[183] *See, e.g.,* International Monetary Fund, *Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Observance of the National Securities Clearing Corporation's Observance of the CPSS–IOSCO Recommendations for Central Counterparties* (2010), at 10, *available at http://www.imf.org/external/pubs/ft/scr/2010/cr10129.pdf* (assessing NSCC's observance of Recommendation 5 from the RCCP that a CCP should maintain sufficient financial resources to withstand, at a minimum, the default of a participant to which it has the largest exposure in extreme but plausible market conditions and noting that NSCC began evaluating itself against this standard in 2009 and has back-testing results to support that during the period from January through April 2009 there was sufficient liquidity to cover the needs of the failure of the largest affiliated family 99.98% of the time); International Monetary Fund, *Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Observance of the Fixed Income Clearing Corporation—Government Securities Division's Observance of the CPSS–IOSCO Recommendations for Central Counterparties* (2010), at 9–10, *available at http://www.imf.org/external/pubs/ft/scr/2010/cr10130.pdf* (finding that Fixed Income Clearing Corporation's Government Securities Division ''observed'' the requirement to maintain enough financial resources to meet the default of its largest participant in extreme but plausible market conditions).

[184] *See supra* note 168 (reflecting that ICE Clear Credit ''looks at two simultaneous defaults of the two biggest losers upon extreme conditions * * *.''). Most centrally cleared CDS transactions have cleared at ICE Clear Credit or ICE Clear Europe Limited. As of April 19, 2012, ICE Clear Credit had cleared approximately $15.6 trillion notional amount of CDS contracts based on indices of securities and approximately $1.5 trillion notional amount of CDS contracts based on individual reference entities or securities. As of April 19, 2012, ICE Clear Europe had cleared approximately €7.2 trillion notional amount of CDS contracts based on indices of securities and approximately €1.2 trillion notional amount of CDS contracts based on individual reference entities or securities. *See https://www.theice.com/marketdata/reports/ReportCenter.shtml.* As of April 19, 2012, CME had cleared approximately $522 billion notional amount of CDS contracts based on indices of securities.

[185] Any person responsible for supervising the operation of the clearing agency's margin model would be viewed as performing the functions associated with the clearing agency's margin model and could not therefore have supervisory authority over the person conducting the model validation.

[186] *See* The DTCC (April) Letter at 13 (supporting Rule 17Ad–22(b)(4) and recommending certain clarifications); *see also* Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed Rule 17Ad–22 concerning standards for clearing agencies); BlackRock Letter at 2 (supporting Rules 17Ad–22(b)(1)–(7) because these rules will benefit the markets by reducing concentration risk, increasing the diversity of market participants involved in governance, enhancing competition and lowering costs for customers of clearing members); LCH Letter at 3 (generally supporting the Commission's proposed rules under 17Ad–22(b)); MFA (Kaswell) Letter at

they also provided several suggested modifications regarding the required frequency of the model validation and how best to achieve the proper level of scrutiny and testing of the model's adequacy. One commenter stated that the rule should not require the model to be validated on an annual basis. Instead, the commenter suggested that the frequency should be left to the discretion of the clearing agency because it is in the best position to determine the appropriate timing,[187] and in the absence of a material change (either to the model itself or in the market environment that affects the model), requiring an annual validation may be unnecessary and overly burdensome.[188]

Commenters also argued that the CCP is in the best position to determine how to conduct a candid assessment free from outside influence concerning its margin models and that qualified internal personnel at the CCP are capable of validating the models if reasonable steps are taken to ensure objectivity (*i.e.,* the reviewers are not the same individuals who are or who were involved in designing the models or who are otherwise biased due to their involvement in implementation of the models).[189] Commenters argued that Rule 17Ad–22(b)(4) should not prescribe a particular method for a clearing agency to achieve that outcome.[190]

One commenter recommended that the Commission should replace the text in proposed Rule 17Ad–22(b)(4) that addresses independence with language from the Proposing Release that ''the person validating the clearing agency's model should be sufficiently free from outside influences so that he or she can be completely candid in their [sic] assessment of the model.'' [191] The commenter stated that this construction is more consistent with RCCP 4: Financial Resources [192] and with Principle 6: Margin from the Consultative version of the FMI Report [193] because it does not prescribe a model validation frequency or a specific way to achieve integrity in the validation process.[194] Another commenter stated that proposed Rule 17Ad–22(b)(4) should be strengthened to require the model validation to be performed by an outside, independent expert and that the CCP must adjust and revalidate the model at any time it has reason to believe the model is no longer adequate.[195]

Another commenter stated that requiring a CCP to bring independence to the model review process by detaching it from the model development process would effectively require maintenance of two quantitative teams.[196] According to this commenter, that result would impose costs on the CCP to staff both teams as well as create potential staffing problems because talented personnel with the requisite quantitative skills often view the review process as non-creative.[197] That structure, the commenter argued, may create adversarial relationships within the CCP and could require senior management to resolve highly-technical disputes between the model development team and model review team.[198]

The same commenter suggested that proposed Rule 17Ad–22(b)(4) should be revised to require a CCP to do the following: (1) Maintain a culture of commitment to quality where correcting and improving models is career-enhancing; (2) adopt sound policies and procedures that create a transparent and auditable model review process; and (3) require that reporting lines must come together at a person who is well-versed in technical quantitative matters.[199] Commenters also cited to the recently released Supervisory Guidance on Model Risk Management, in which the Federal Reserve and the Office of the Comptroller of the Currency stated that ''corporate culture plays a role [in providing appropriate incentives for proper model review] if it establishes support for objective thinking and encourages questioning and challenging of decisions'' and that ''independence *may* be supported by separation of reporting lines, [but] it should be judged by actions and outcomes because there may be additional ways to ensure objectivity and prevent bias.'' [200]

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(4) with certain modifications to address concerns raised by commenters, including the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. In light of comments asking the Commission to clarify the standard of independence of the qualified person who performs the model validation, the Commission is revising the text of Rule 17Ad–22(b)(4) so that the annual model validation must be performed by a qualified person who is free from influence from the persons responsible for development or operation of the systems and models being validated. Generally, the Commission would consider that a person was free from influence when that person does not, including but not limited to, perform functions associated with the clearing agency's margin models (except as part of the annual model validation) and does not report to a person who performs these functions. The Commission believes that the change from the proposal addresses the concerns raised by commenters.[201] Specifically, the Commission agrees that who will be the reviewer of the model is best left to the discretion of the CCP, so long as the goals of the model validation process are achieved.[202]

As proposed, Rule 17Ad–22(b)(4) would not have permitted the model validation to be performed by a person performing functions associated with the CCP's margin models (except as part of the annual model validation), or who reports to a person who performs those functions.[203] The Commission reasoned in the Proposing Release that a person involved with the functions related to the model's operation, or someone who reports to such a person, may be less

2 (generally supporting the Commission's proposed rules under 17Ad–22(b)).

[187] *See* The DTCC (April) Letter at 13.

[188] *See id.*

[189] *See* The DTCC (April) Letter at 13; The OCC Letter at 11.

[190] *See* The DTCC (April) Letter at 13.

[191] *See* The DTCC (April) Letter at 14.

[192] *See RCCP, supra* note 33, at 19.

[193] *See Principles for Financial Market Infrastructures Consultative Report* (Mar. 2011), at 40, *http://www.iosco.org/library/pubdocs/pdf/IOSCOPD350.pdf; but see supra* note 32, at 56 (stating in the finalized FMI Report that a CCP should have its margin model validated at least annually).

[194] *See* The DTCC (April) Letter at 15.

[195] *See* Better Markets Letter at 6.

[196] *See* The OCC Letter at 11.

[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] *See id.; see also* The DTCC (April) Letter at 14 (citing Supervisory Guidance on Model Risk Management (Apr. 4, 2011)), *available at http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf.*

[201] *See, e.g.,* The OCC Letter at 11–12 (stating that ''[w]e think that a clearing agency is capable of validating its own models through the use of qualified internal personnel, provided that appropriate steps are taken to ensure objectivity, such as ensuring that the reviewers are not the same individuals as those who are or were involved in designing such models or are otherwise biased due to their involvement in implementation of the models. Many employees who perform functions associated with margin models may have no particular conflict or bias that would prevent them from conducting objective model validations and, in fact, many such employees may have a strong interest in ensuring that margin models are as well-designed as possible.'').

[202] *See* The DTCC (April) Letter at 14 (''The DTCC model risk policy provides that all models must be certified as valid by a qualified independent reviewer, defined as 'a qualified reviewer that did not develop and does not currently own the model.' The reviewer may be an individual or unit within the organization or an outside consultant.'').

[203] *See supra* note 185 and accompanying text.

likely to evaluate critically the margin models.[204] After considering the comments, the Commission agrees that instead of requiring a particular method or reporting structure, the less-prescriptive language from the Proposing Release, namely, that a person may perform the model validation as long as that person is free from influence from the persons responsible for development or operation of the systems and models being validated so that he or she can be candid in his or her assessment of the model, would be appropriate to achieve the intended purpose.

The Commission also notes that the ''sufficiently free from influence'' standard is consistent with the FMI Report, which does not prescribe a specific method to assure the effectiveness of the validation process,[205] and is consistent with the recent guidance from the Federal Reserve and the Office of the Comptroller of the Currency in Supervisory Guidance on Model Risk Management.[206] The revised standard adopted by the Commission herein would not require the clearing agency to detach model review from model development or to maintain two separate quantitative teams and thus would not lead to potential increased costs.

The Commission is not persuaded that the model validation must be performed by an outside independent expert.[207] As noted above, the Commission believes that objectivity can be preserved where the person performing the model validation is an employee of the CCP as long as the clearing agency strictly adheres to the standard the Commission is adopting herein. Because the Commission has not previously required CCPs to perform an annual model validation, we understand that the implementation of this requirement may require the exercise of substantial judgment by such clearing agencies in the adoption and implementation of written policies and procedures. The Commission intends to review the development of compliance practices and to issue interpretive guidance as appropriate.

The Commission is not persuaded that the frequency of the model validation should be left to the discretion of the CCP. Current model validation practices vary among CCPs. Some CCPs conduct annual validations, while other conduct them on an ad hoc basis. Because of the role margin plays in a default, a CCP needs assurance of its value in the event of liquidation, as well as the capacity to draw upon its margin promptly. The Commission believes, especially considering its statutory responsibilities and the importance of model validation in limiting systemic risk, that it is important to create a consistent and uniformly applied minimum standard across all clearing CCPs. The Commission believes that requiring model validation at least annually is appropriate because model performance is not ordinarily expected to vary significantly over short periods but should be reevaluated as market conditions change. Furthermore, the Commission does not think the standard of an annual model validation is too burdensome, particularly given the fact that the Commission is not prescribing any specific qualifications or credentials of the person performing the model validation and is not requiring the person performing the model validation to be independent of the clearing agency and given how important understanding of the margin methodology is to the risk management framework.

The requirement for an annual model validation does not preclude the CCP from adjusting its model any time it has reason to believe that the model is no longer adequate. In fact, as noted above, Rule 17Ad–22(b)(2) requires a CCP to review its risk-based models to set margin requirements at least monthly.

The Commission continues to believe that clearing agencies that provide CCP services must have a qualified person conduct a review of models that are used to set margin levels, along with related parameters and assumptions, to assure that the models perform in a manner that facilitates prompt and accurate clearance and settlement of transactions. In determining whether a person is qualified to conduct the model validation, registered CCPs may consider several factors, including the person's experience in validating margin models, expertise in risk management generally, and understanding of the clearing agency's particular operations and procedures.

While the Commission agrees with the commenter who suggested that CCPs should strive to create a culture of commitment to quality where improving models is career-enhancing and to adopt sound policies and procedures to create a transparent and auditable model review process,[208] the Commission believes that this result can be achieved by requiring that a model validation review occur annually and that the reviewer be qualified and free from influence from the persons responsible for development or operation of the systems and models being validated.

D. Participant Access Standards for Central Counterparties: Rules 17Ad–22(b)(5)–(7)

Section 17A of the Exchange Act requires that a clearing agency shall not be registered unless the Commission determines, among other things, that the clearing agency's rules do not impose burdens on competition that are unnecessary or inappropriate to promote the purposes of the Exchange Act[209] and that the rules are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the CCP.[210] Therefore, when evaluating the participation standards at a CCP, the Commission must strike an appropriate balance between affording CCPs the necessary discretion to select clearing members that do not jeopardize the CCP's ability to facilitate prompt and accurate clearance and settlement while also not impeding access to central clearing among a range of market participants.

Rules 17Ad–22(b)(5), (6) and (7) introduce certain requirements regarding access to registered CCPs. Respectively, the rules would require a registered CCP to do the following: (1) Provide the opportunity for a person who does not perform any dealer or security-based swap Dealer services to obtain membership; (2) refrain from using minimum portfolio size and minimum volume transaction thresholds as conditions to membership; and (3) provide the ability to obtain membership to persons who maintain net capital equal to or greater than $50 million.

Rules 17Ad–22(b)(5), (6) and (7) each address the common topic of access to and participation in CCPs. Several commenters provided general comments on that shared focus. Those comments represent a wide range of views and are reflected immediately below.

Some commenters expressed their general support for the ways that Rules 17Ad–22(b)(5), (6), and (7) would promote fair and open access to CCP services through CCP participation

[204] *See supra* note 35.

[205] *See FMI Report, supra* note 32.

[206] Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, *Supervisory Guidance on Model Risk Management* (Apr. 4, 2011), at 9, *available at http://occ.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf* (stating that independence for model review ''should be judged by actions and outcomes, since there may be [many] ways to ensure objectivity and prevent bias'').

[207] *See supra* note 195.

[208] *See supra* note 199 and accompanying text.

[209] 15 U.S.C. 78q–1(b)(3)(F).

[210] 15 U.S.C. 78q–1(b)(3)(G).

requirements that are risk appropriate without being unnecessarily restrictive.[211] One of these commenters expressed support for the design of the rules but also made a request for the rules to offer more flexibility and latitude for CCPs to establish participation requirements that ensure integrity of operation and risk management.'' [212]

Two commenters urged the Commission not to adopt proposed Rules 17Ad–22(b)(5), (6) and (7).[213] The first commenter concluded that the proposed rules, while well-intentioned, ''are unnecessary and counterproductive to the goal of fair and open access within a framework of the safe and sound operation of clearing agencies.'' [214] In particular, this commenter stated its belief that proposed Rules 17Ad–22(b)(5), (6) and (7) are overly prescriptive and that the Commission already has ample and alternative authority under which to monitor membership practices.[215] Specifically, the commenter pointed to the existing requirement in Section 17A(b)(3)(F) of the Exchange Act that a clearing agency shall not be registered unless the Commission determines that the clearing agency's rules are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency. The commenter also stated that if proposed Rule 17Ad–22(d)(2) is adopted, that rule would already require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to have participation requirements that are objective, publicly disclosed, and that permit fair and open access.[216] Finally, this commenter argued that proposed Rules 17Ad–22(b)(5), (6) and (7) do not conform to current or proposed global standards related to participation in CCPs. In contrast, the commenter stated its belief that Section 17A(b)(3) of the Exchange Act and proposed Rule 17Ad–22(d)(2) are consistent with RCCP Recommendation 2: Participation requirements [217] as well as FMI Principle 18: Access and participation requirements.[218]

The second commenter, while not opposed to the substance of proposed Rules 17Ad–22(b)(5), (6) and (7), generally questioned the need to hard wire these requirements into the Commission's rules.[219] Specifically, this commenter argued that the Commission already has authority under Section 17A(b)(3)(F) of the Securities Exchange Act to deny registration to a clearing agency if the clearing agency's rules are designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency.[220] In addition, this commenter stated that under proposed Rule 17Ad–22(d)(2) the Commission would gain less prescriptive but broader and coextensive rule-based authority without imposing ''one size fits all'' access requirements.[221]

In the ''Final Rule and Guidance'' sections for Rules 17Ad–22(b)(5), (6) and (7) below, we address these more general comments in the context of a discussion of the more specific comments the Commission received on the proposed rules.

1. Rule 17Ad–22(b)(5): Non-Dealer Member Access

a. Proposed Rule

Rule 17Ad–22(b)(5), as proposed, would require a registered CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide the opportunity for a person that does not perform any dealer [222] or security-based swap dealer [223] services to obtain membership on fair and reasonable terms at the CCP in order to clear securities for itself or on behalf of other persons.

b. Comments Received

Some commenters generally supported the goals of Rule 17Ad–22(b)(5),[224] while other commenters expressed several concerns.[225] Specifically, one commenter stated that ''any regulatory mandate to admit specific entities as members of a CCP could undermine the impartial development and application of risk-based standards for membership.'' [226] This commenter acknowledged the discussion in the Proposing Release explaining that proposed Rule 17Ad–22(b)(5) would not prohibit a clearing agency from using factors aside from a potential clearing member's dealer or security-based swap dealer status to make an admissions decision, but nevertheless urged the Commission to forgo adoption of the rule altogether because it believes clearing agencies should be permitted, under Commission oversight, to determine how best to promote correspondent clearing [227] and to design membership standards.[228] The

[211] *See* LCH Letter at 3 (upholding the Commission's intent of ''ensuring broad participation in and open access to clearing agencies''); MFA (Kaswell) Letter at 2, 3 (generally supporting the Commission's proposed rules under 17Ad–22(b)); CME Letter at 3 (generally supporting ''the regulatory objective of participation requirements that are risk appropriate without being unnecessarily restrictive, in order to promote fair and open access to clearing services.'').

[212] *See* LCH Letter at 3.

[213] *See* The DTCC (April) Letter at 9; The OCC Letter at 12.

[214] *See* The DTCC (April) Letter at 18.

[215] *See id.*

[216] *See id.*

[217] RCCP Recommendation 2 provides that ''[a] CCP's participation requirements should be objective, publicly disclosed, and permit fair and open access.''

[218] Principle 18 from the FMI Report provides that ''[a]n FMI should have objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access.''

[219] *See* The OCC Letter at 12.

[220] *See id.*

[221] *See id.*

[222] The term ''dealer'' is defined in Section 3(a)(5) of the Exchange Act and means any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise. The definition contains an exception for a person that buys or sells securities for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business. There is also an exception for banks engaging in certain specified activities. *See* 15 U.S.C. 78c(a)(5) for the complete definition.

[223] Pursuant to Section 761 of the Dodd-Frank Act, the term ''security-based swap dealer'' is added as Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a), and generally means any person who (A) Holds itself out as a dealer in security-based swaps; (B) makes a market in security-based swaps; (C) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (D) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps. The Commission and the CFTC jointly adopted rules to further define the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' ''major security-based swap participant,'' and eligible contract participant.'' *See supra* note 12 (*Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'',* Securities Exchange Act Release No. 34–66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012)).

[224] *See supra* note 211 (citing LCH Letter, MFA (Kaswell) Letter, and CME Letter); *see also* Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed Rule 17Ad–22 concerning standards for clearing agencies); BlackRock Letter at 2 (supporting Rules 17Ad–22(b)(1)–(7) because these rules will benefit the markets by reducing concentration risk, increasing the diversity of market participants involved in governance, enhancing competition and lowering costs for customers of clearing members).

[225] *See* The DTCC (April) Letter at 18–19; The OCC Letter at 12.

[226] *See* The DTCC (April) Letter at 18.

[227] Correspondent clearing is an arrangement between a current participant of a clearing agency and a non-participant that desires to use the clearing agency for clearance and settlement services.

[228] *See* The DTCC (April) Letter at 18–19. The commenter also stated its belief that ''financial resources'' and ''creditworthiness'' should be expressly added to the factors that may be considered. Moreover, the commenter suggested that the term ''otherwise qualified'' be clarified as it was not precise enough standard to meaningfully inform clearing agencies of what criteria may be considered when evaluating potential members.

commenter suggested that if the rule is adopted, it should be modified to reflect the more permissive process for evaluation described in the body of the Proposing Release, namely by clarifying that the clearing agency may take other factors into account in making membership decisions.[229]

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(5) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies.

While the Commission understands concerns raised by commenters, the Commission ultimately believes that the benefits of Rule 17Ad–22(b)(5) are critical to maintaining fairness and open access to central clearing for all market participants, including security-based swaps participants. The Commission believes that no registered CCP should deny membership solely because a person does not perform any dealer or security-based swap dealer services and that such a requirement unfairly discriminates against certain market participants and should be prohibited. The Commission does not believe that performing dealer or security-based swap dealer services is, by itself, a sufficient indicator of whether an applicant should be admitted to a clearing agency.

Dealer and security-based swap dealer services generally involve services designed to facilitate securities transactions by buying and selling securities for a person's own account.[230] The Commission continues to believe that requiring registered CCPs to allow persons who are not dealers or security-based swap dealers to become members of the clearing agency will promote more competition by allowing more firms to clear, thereby increasing competition among clearing members on both price and service which should, in turn, reduce costs to market participants. The enhanced access to central clearing should engender more correspondent clearing in the security-based swap market. Because of the relationship between security-based swaps and traditional securities (*e.g.,* market participants using security-based swaps to hedge positions in traditional securities), the Commission believes that applying these rules to all CCPs will help ensure that market participants have access to central clearing in all instruments that are centrally cleared.

In situations where direct access to clearing agencies is limited by reasonable participation standards, firms that do not meet these standards may still be able to access clearing agencies through correspondent clearing arrangements with direct participants.[231] Such a process involves the non-participant entering a correspondent clearing arrangement with a participant so that the transaction may be submitted by the participant to the clearing agency. Thus, the success of correspondent clearing arrangements depends on the willingness of participants to enter such arrangements with non-participant firms that may act as direct competitors to the participants in the participants' capacity as dealers or security-based swap dealers in the market for the relevant securities. Given that the existing CCP participants that are dealers or security-based swap dealers may therefore have incentives to restrict competitors in the securities execution markets from accessing a CCP, correspondent clearing arrangements may be inhibited unless participants that do not provide dealer or security-based swap dealer services are provided with the ability to become direct members of a clearing agency.

Also, the Commission is not persuaded by the comment that Rule 17Ad–22(b)(5) is likely to undermine the impartial development and application of risk-based standards for membership.[232] Simply stated, Rule 17Ad–22(b)(5) is designed to prohibit registered CCPs from denying membership on fair and reasonable terms to otherwise qualified persons solely by virtue of the fact that they do not perform any dealer or security-based swap dealer services.[233] The Commission fully recognizes that persons who are not dealers or security-based swap dealers may fail to meet other standards for membership at a clearing agency, such as the operational capabilities required for direct participation. While non-dealer status cannot serve as the sole reason for denying membership, Rule 17Ad–22(b)(5) does not prohibit a registered CCP from taking other standards of membership into account when establishing membership criteria for non-dealers.

Because the factors that each CCP considers when establishing membership criteria differ based on the particular characteristics of the relevant clearing agency and the markets it serves, the Commission believes that it would be counterproductive to modify Rule 17Ad–22(b)(5) to make it more specific and therefore more constraining. One commenter, however, requested that the Commission provide additional clarity in terms of what is required to be considered ''otherwise qualified'' for membership at a CCP.[234] In response to this comment, the Commission notes that, for purposes of Rule 17Ad–22(b)(5), the term ''otherwise qualified'' means that the clearing agency's sole reason for denying membership to a prospective participant would be the prospective participant's status as a non-dealer or non security-based swap dealer and that it otherwise maintains the financial resources, creditworthiness, operational capacity, and any other additional characteristics necessary to meet the obligations of participation. As CCPs shape practices to come into compliance with Rule 17Ad–22(b)(3), the Commission will consider whether further guidance is appropriate.

The Commission believes that the incentives of persons who do not perform dealer or security-based swap dealer services to promote access at a CCP in general would tend to be consistent with increased competition in the market for the relevant securities. These persons do not execute securities trades for their own account. Instead, they provide correspondent clearing services for market participants.[235] As a result, their ability to provide correspondent clearing services would tend to increase as competition and transaction volumes increased. Accordingly, the Commission believes that Rule 17Ad–22(b)(5) will foster the development of correspondent clearing arrangements that will allow market participants who are not dealers or security-based swap dealers to obtain access to a registered CCP and that such access will have the beneficial result of greater competition in and access to central clearing. Moreover, because entities must meet all of the standards for membership, the Commission does not believe that it will undermine the

[229] *See* The DTCC (April) Letter at 19.

[230] *See supra* note 222.

[231] *See* Exchange Act Release Nos. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) and 64018 (Mar. 3, 2011), 76 FR 12645 (Mar. 8, 2011) (Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC).

[232] *See supra* note 228.

[233] *See* Proposing Release, *supra* note 35, at Section II.A.

[234] *See supra* note 229.

[235] For a description of correspondent clearing activity, *see generally The Role and Regulation of Clearing Brokers,* 48 Bus. Law 841 (May 1993).

development or application of risk management standards.

2. Rule 17Ad–22(b)(6): Portfolio Size and Transaction Volume Thresholds Restrictions

a. Proposed Rule

Rule 17Ad–22(b)(6), as proposed, would prohibit a CCP from having membership standards that require participants to maintain a portfolio of any minimum size or to maintain a minimum transaction volume.

b. Comments Received

Some commenters expressed general support for the goals of proposed Rule 17Ad–22(b)(6).[236] At the same time, one commenter opposed adoption of the rule because of concern that ''any regulatory mandate on portfolio size and transaction volume thresholds could undermine the impartial development and application of risk-based standards for membership'' in a CCP.[237] This commenter also questioned why certain language in the discussion section of the Proposing Release (explaining that the proposed rule ''would not prohibit a central counterparty from considering portfolio size and transaction volume as one of several factors when reviewing a potential participant's operations'') was not included in the text of the proposed rule.[238] In addition, the commenter stated that even if a CCP has the discretion to consider portfolio size and transaction volume when making a membership decision, it is unclear how much weight the clearing agency actually may give to this factor without running afoul of Rule 17Ad–22(b)(6).[239] Finally, this commenter noted that it ultimately would prefer to see the Commission not adopt Rule 17Ad–22(b)(6) and instead continue to oversee determinations made by clearing agencies concerning membership standards and the weight, if any, to be given to portfolio size and transaction volume.[240]

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(6) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies.

We believe that imposing minimum thresholds on the size or transaction volume of a participant's portfolio would not function as a good indicator of whether the participant is able to meet its obligations to a CCP.[241] The Commission believes that trading volume and portfolio size alone are poor grounds for limiting participant access to central clearing, and that sole use of these criteria could indicate unfair discrimination against certain market participants and thus should be prohibited as the sole basis for determining membership.

New participants to a CCP that do not, at least initially, intend to transact in substantial size or volume may nevertheless have the operational and financial capacity to perform the activities that other participants are able to perform. Therefore, the Commission believes that Rule 17Ad–22(b)(6) will help facilitate compliance with the requirement in Section 17A of the Exchange Act that the rules of a CCP must permit fair and open access.[242]

For the same reasons discussed in connection with Rule 17Ad–22(b)(5), the Commission is not persuaded by the comment that Rule 17Ad–22(b)(6) is likely to undermine the impartial development and application of risk-based standards for membership.[243] Specifically, the rule does not prohibit a CCP from considering portfolio size and transaction volume as one of several factors when reviewing a potential participant's operations. Rather, the rule prohibits the establishment of minimum portfolio sizes or transaction volumes that by themselves would act as barriers to participation by new participants in clearing. Rule 17Ad–22(b)(6) is an absolute bar to the sole use of these criteria for determining membership. The Commission also does not believe that it would be prudent to modify the rule text to make it more specific and potentially more constraining because the factors that each CCP considers when establishing appropriate membership criteria differ to some degree based on the particular characteristics of the relevant clearing agency and the markets it serves. As noted more generally in Section II.B above, the Commission will consider whether to issue further guidance to facilitate compliance as clearing agencies establish, implement, maintain and enforce policies and procedures responsive to Rule 17Ad–22(b)(6).

3. Rule 17Ad–22(b)(7): Net Capital Restrictions

a. Proposed Rule

Proposed Rule 17Ad–22(b)(7) would require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide a person that maintains net capital[244] equal to or greater than $50 million with the opportunity to obtain membership at the CCP, with any net capital requirements being scalable so that they are proportional to the risks posed by the participant's activities to the CCP.

b. Comments Received

Some commenters supported proposed Rule 17Ad–22(b)(7).[245] Several commenters expressed support for the rule because it would require access to a CCP to be scaled in a risk-based way.[246] One of these commenters expressed the hope that the CFTC would adopt a similar requirement and urged the Commission to work together with the CFTC to harmonize their respective rules in this area.[247]

Another commenter supportive of Rule 17Ad–22(b)(7) urged the Commission to modify the rule to eliminate the ability of a CCP to raise its minimum net capital threshold above $50 million.[248] This commenter stressed that if the Commission declined to take such action when adopting a final rule, then the Commission should (i) Require the clearing agency's rationale to meet a higher burden of proof than currently proposed; (ii) require the clearing agency to demonstrate not only that it

[236] *See supra* note 211 (citing LCH Letter, MFA (Kaswell) Letter, and CME Letter); *see also* Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed Rule 17Ad–22 concerning standards for clearing agencies); BlackRock Letter at 2 (supporting Rules 17Ad–22(b)(1)–(7) because these rules will benefit the markets by reducing concentration risk, increasing the diversity of market participants involved in governance, enhancing competition and lowering costs for customers of clearing members).

[237] *See* The DTCC (April) Letter at 19.

[238] *See id.*

[239] *See* The DTCC (April) Letter at 19–20.

[240] *See* The DTCC (April) Letter at 20.

[241] Rule 17Ad–22(b)(6) would not prohibit a clearing agency from imposing *maximum* portfolio sizes or transaction volume amounts.

[242] *See supra* note 210.

[243] *See supra* note 237.

[244] Proposed Rule 17Ad–22(a)(5) would define ''net capital'' for the limited purposes of proposed Rule 17Ad–22(b)(7) to have the same meaning as set forth in Rule 15c3–1 under the Exchange Act for broker-dealers or any similar risk adjusted capital calculation for all other prospective clearing members.

[245] *See* MFA (Kaswell) Letter at 3; ISDA Letter at 4; BlackRock Letter at 1.

[246] *See* ISDA Letter at 4; MFA (Kaswell) Letter at 3; BlackRock Letter at 1.

[247] *See* ISDA Letter at 4. *See also* Derivatives Clearing Organization General Provisions and Core Principles, *supra* note 38 (in which the CFTC adopted Rule 39.12(a)(2)(iii) to require that a DCO shall not set a minimum capital requirement of more than $50 million for any person that seeks to become a clearing member in order to clear swaps).

[248] *See* MFA (Kaswell) Letter at 4–5 (noting that the CFTC in the DCO Release adopted rule 39.12(a)(2)(iii) in a form that does not permit adjustment of the $50 million net capital requirement for membership).

could not effectively manage the risk using other measures but also that raising the minimum capital requirement is the least restrictive means by which to address the risk posed to the clearing agency; and (iii) review the clearing agency's showing and make an express determination that no other, less- competitively-restrictive measures are available to the clearing agency to manage the risk effectively.[249]

One commenter stated that net capital, without regard to other risk factors, does not conclusively establish creditworthiness or any of the other generally accepted qualifications for becoming a member of a CCP.[250] Another commenter agreed with this assertion, but cited it as support for Rule 17Ad–22(b)(7) on the basis that clearing members with net capital closer to $50 million may have other characteristics that make their risk profile less risky than clearing members with greater amounts of net capital.[251]

Several commenters expressed concern over proposed Rule 17Ad–22(b)(7).[252] One commenter stated that the proposed $50 million net capital standard could create conditions where a clearing member at that net capital level might use its $50 million of net capital to access multiple clearing agencies.[253] Commenters suggested that this standard would increase the likelihood that the clearing member would not be able to meet capital calls close in time from multiple clearing agencies.[254] To address this concern about margin call risk, the commenter suggested that the rule should be modified to require: (i) Daily reporting from each clearing member of its capital cover for the potentially numerous assessments that it could be subject to from each clearing agency where it is a member; (ii) the clearing member to conduct regular stress tests at an ''extreme but plausible'' market level in relation to the potentially numerous clearing agency assessments that it could be subject to, and to provide the results to each clearing agency where it is a member; and (iii) each clearing agency to monitor and assess, on a daily basis, the ability of a clearing member and its related affiliates to meet these potential assessment exposures and share this daily analysis with other CCPs and any relevant prudential regulator.[255] The commenter stated that unless regulators and clearing agencies are able and willing to commit to these actions, then it believes that a far larger minimum net capital requirement, such as $1 billion, is appropriate.[256]

Another commenter expressed concern that because not all market participants use a net capital computation, the proposed rule could give unfair advantages to some market participants over others in terms of gaining and retaining membership at a CCP.[257] The commenter concluded that proposed Rule 17Ad–22(b)(7) should not be adopted, and instead CCPs should continue to determine membership standards subject to Commission oversight (including capital requirements and other measures of creditworthiness) as well as how best to ensure that access to the clearing agency is fair and open.[258]

One commenter noted the Commission's reference in the Proposing Release to the tiered membership standards of the FICC as an example of capital-related requirements that differentiate between types of participants.[259] The commenter stated its opposition to ''tiers'' in the membership structure of CCPs on the basis that they can have discriminatory or anti-competitive effects.[260] Finally, another commenter stated it generally does not see the need for the approach proposed in Rule 17Ad–22(b)(7) because it believes the Commission has other tools at its disposal to review membership standards on a case-by-case basis that account for the nature of a particular clearing agency's activities and the risks associated with those activities.[261]

c. Final Rule

The Commission is adopting Rule 17Ad–22(b)(7) with certain modifications, including the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. As noted by the commenters expressing support for the rule,[262] we believe that persons that maintain a net capital level of equal to or greater than $50 million, as well as an appropriate level of financial expertise, should not be denied participation in a CCP based solely on their net capital levels, provided that such persons are able to comply with other reasonable membership standards. In the Proposing Release, we cited recent broker-dealer reporting data available to the Commission reflecting that the $50 million threshold for net capital is a standard that provides the potential for approximately 4% of the total number of broker-dealers or approximately 201 firms could be eligible to gain clearing membership at one of the registered clearing agencies.[263] According to this data, raising the net capital requirement to $100 million would have reduced the community of eligible broker-dealers by 73 firms or 35% to 128 eligible firms, while reducing the net capital threshold to as low as $25 million would increase the number of broker-dealer potentially eligible for membership by 86 firms or 43% to 287 firms (approximately 6% of broker-dealers). The Commission believes that firms that maintain a net capital level of equal to or greater than $50 million have sufficient financial resources to participate at some level in a CCP provided that they are able to comply with other reasonable membership standards and is concerned that some firms with less than $50 million of net capital may not have sufficient financial resources to fulfill membership obligations. The rule also ensures that each clearing agency will have the flexibility to develop scalable policies and procedures to limit the activities of participants based on their level of net capital.[264] For example, a CCP can place limits on its potential exposure to participants operating at certain net capital thresholds by restricting the maximum size of the portfolio such participants are permitted to maintain at the clearing agency. Accordingly, the Commission believes the $50 million minimum standard strikes the proper balance between promoting open access to central clearing among participants that have the capacity to participate without posing undue risk to CCPs. The Commission also believes that Rule 17Ad–22(b)(7) would facilitate sound

[249] *See* MFA (Kaswell) Letter at 4–5.

[250] *See* The DTCC (April) Letter at 20.

[251] *See* MFA (Kaswell) Letter at 3.

[252] *See* The OCC Letter at 12; The DTCC (April) Letter at 9.

[253] *See* ISDA Letter at 3.

[254] *See id.*

[255] *See id.*

[256] *See id.*

[257] *See* The DTCC (April) Letter at 20.

[258] *See id.*

[259] *See* MFA (Kaswell) Letter at 4.

[260] *See id.*

[261] *See* The OCC Letter at 12.

[262] *See supra* note 245.

[263] Even if proposed Rule 17Ad–22(b)(7) is successful in encouraging the broadening of membership in CCPs that clear CDS, the Commission believes the number of broker-dealers newly eligible for clearing membership that become clearing members as a result of this change is likely to be substantially less than 201.

[264] The Commission notes that some clearing agencies currently utilize capital-related requirements that differentiate among types of participants. For instance, the FICC has maintained a $50 million net worth requirement and $10 million excess net capital requirement for its Category 1 Dealer Netting Members and a $25 million net worth requirement and $10 million excess net capital requirement for its Category 2 Dealer Netting Members. This type of arrangement would continue to be acceptable under Rule 17Ad–22(b)(7).

risk management practices by the clearing agencies. The CCPs that seek Commission permission to employ a higher net capital requirement as a condition for membership at the clearing agency must demonstrate to the Commission that such a requirement is necessary to mitigate risks that could not otherwise be effectively managed by other measures. The CCPs seeking to implement such requirements should examine and articulate the benefits of higher net capital requirements and link the nature and degree of participation with the potential risks posed by the participant.

The Commission also does not believe that $50 million net capital standard contained in Rule 17Ad–22(b)(7) would give an advantage to some prospective members at a CCP over others. Further, the rule explicitly is not intended in any way to create an ''entitlement'' to membership for firms with more than $50 million in capital. Upon adoption of Rule 17Ad–22, a registered CCP cannot restrict access because a participant does not have a net capital level of $50 million or more; however, the CCP's policies and procedures can prescribe other reasonable membership standards and can be reasonably designed to limit the activities of the participant in comparison to the activities of other participants that maintain a higher net capital level. For example, as a way to help make its requirements scalable, a registered CCP may elect to place limits on its potential exposure to participants operating at certain net capital thresholds by restricting the maximum size of the portfolio such participants are permitted to maintain at the CCP.

Rule 17Ad–22(b)(7) also permits a registered CCP to provide for a higher net capital requirement (*i.e.,* higher than $50 million) as a condition for membership at the clearing agency if the clearing agency demonstrates to the Commission that such a requirement is necessary to mitigate risks that could not otherwise be effectively managed by other measures, such as scalable limitations on the transactions that the participants may clear through the CCP, and the Commission approves the higher net capital requirement as part of a rule filing or clearing agency registration application. While the Commission is sympathetic to commenters who asked the Commission to eliminate the ability in Rule 17Ad–22(b)(7) of a clearing agency to impose a higher net capital requirement and argued for a heightened burden of proof in such cases,[265] the Commission has decided not to modify this part of the rule. Specifically, the Commission recognizes the benefit of maintaining flexibility to allow a CCP to impose higher net capital requirements in circumstances where that is necessary to mitigate risks that could not otherwise be effectively managed by other measures. For the same reason, the Commission is declining to modify the rule to prohibit a CCP from having tiered membership standards. The Commission is not persuaded by commenters who stated that use of tiered membership standards by clearing agencies is by itself anti-competitive because the Commission believes the approach taken by the rule permits well capitalized mid-tier firms to compete directly with large dealers and notes that Section 17A of the Exchange Act expressly requires that the rules of a clearing agency not be designed in a way that the rules discriminate among participants in their use of clearing agency services.[266] It is the Commission's view that tailoring participant membership standards based on participant risk profile is neither discriminatory nor anti-competitive. In addition, the use of scalable limitations on the transactions that the participants may clear and settle through the clearing agency is likely to be a key tool for allowing a clearing agency to comply with Rule 17Ad–22(b)(7) without encountering the delay and operational difficulties of having to request Commission approval to impose a net capital requirement that exceeds $50 million and without compromising the clearing agency's risk management standards.[267]

Finally, the Commission did not make any changes to Rule 17Ad–22(b)(7) in response to suggestions that the rule could create margin call risk because a participant with the minimum net capital level might access multiple clearing agencies.[268] The Commission does not believe that the rule will increase margin call risk. While the Commission understands the concerns raised by this commenter, the Commission believes that the clearing agencies themselves are best positioned to address this issue due to their expertise in this area, as well as their other regulatory obligations related to their risk management and financial well-being. Rule 17Ad–22(d)(2) requires clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the CCP and have procedures in place to monitor that participation requirements are met on an ongoing basis. Accordingly, a small clearing member should not be able to expose a clearing agency to significant risk even if it is able to clear at multiple CCPs.[269] The Commission also will be able to monitor the financial strength of clearing members that are registrants pursuant to other financial reporting requirements. Accordingly, we believe that it is important to allow CCPs enough flexibility to determine the most effective approach for mitigating any potential call risk. In addition, the Commission will continue to monitor this issue and will consider whether any regulatory changes are necessary based on experience with the $50 million capital standard. The Commission will also consider any further action responsive to this issue after receiving input from interested parties through the outreach described in Section II.B.

E. Record of Financial Resources and Annual Audited Financial Statements: Rules 17Ad–22(c)(1)–(2)

1. Rule 17Ad–22(c)(1): Record of Financial Resources for Central Counterparties

a. Proposed Rule

Proposed Rule 17Ad–22(c)(1) would provide that each fiscal quarter (based on calculations made as of the last business day of the clearing agency's fiscal quarter), or at any time upon Commission request, a CCP shall calculate and maintain a record [270] of the financial resources necessary to meet its requirement in proposed Rule 17Ad–22(b)(3) and sufficient documentation to explain the methodology it uses to compute such financial resource requirement.

[265] *See supra* notes 248–249 and accompanying text.

[266] *See id.*

[267] *Compare with* note 258 and accompanying text (the Commission is not persuaded by the position that Rule 17Ad–22(b)(7) should not be adopted, but agrees with the commenters premise that clearing agencies should retain some discretion to allow their expertise to inform participation standards within the requirements of the rule).

[268] *See supra* notes 253–256 and accompanying text.

[269] For example, CCPs that participate in the Shared Market Information System (SHAMIS) will be able to see a clearing member's risk and financial information across participating CCPs, and a CCP also could on its own initiative require clearing members to directly report their clearing activity at other clearing agencies. Other similar systems may develop in the future.

[270] *See* Exchange Act Rule 17a–1 (17 CFR 240.17a–1). Clearing agencies may destroy or otherwise dispose of records at the end of five years consistent with Exchange Act Rule 17a–6 (17 CFR 240.17a–6).

b. Comments Received

Commenters generally supported proposed rule 17Ad–22(c)(1).[271]

c. Final Rule

We are adopting Rule 17Ad–22(c)(1) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. The Commission believes that it is appropriate to require registered clearing agencies to make these calculations quarterly or at any time based on the request of the Commission because it provides a periodic update of the financial resources that are needed by the clearing agencies as market conditions change. The structure of Rule 17Ad–22(c)(1) also provides flexibility for the Commission to request such calculations on a real-time basis, which we believe to be useful during periods of market stress or other circumstances where more timely information is desired. The Commission believes that these calculations and related documentation will also help our oversight of compliance by clearing agencies with Rule 17Ad–22(b)(3) by providing a clear record of the method used by the clearing agency to maintain sufficient financial resources.

2. Rule 17Ad–22(c)(2): Clearing Agency Annual Audited Financial Statements

a. Proposed Rule

Rule 17Ad–22(c)(2), as proposed, would require a clearing agency to post on its Web site an annual audited financial report. Each financial report would be required to: (i) Be a complete set of financial statements of the clearing agency for the most recent two fiscal years of the clearing agency and be prepared in accordance with U.S. generally accepted accounting principles (''U.S. GAAP''), except that for a clearing agency that is a corporation or other organization incorporated or organized under the laws of any foreign country, the financial statements may be prepared according to U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (''IFRS''); (ii) be audited in accordance with standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01); and (iii) include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02).

b. Comments Received

Commenters generally supported proposed Rule 17Ad–22(c)(2).[272] In response to a question asked by the Commission in the Proposing Release, one commenter stated that it does not believe the Commission should require a reconciliation to U.S. GAAP for reports prepared using IFRS because it believes that IFRS is a high-quality set of accounting standards that is widely recognized, understood and used by investors when evaluating investment opportunities.[273] The commenter also asked the Commission to consider allowing non-U.S. based clearing agencies to prepare their financial statements in accordance with accounting standards generally accepted in the clearing agency's particular jurisdiction so long as the financial statements are accompanied by a reconciliation to U.S. GAAP.[274] The commenter suggested that not allowing this flexibility could force non-U.S. based clearing agencies to post financial statements on their Web site that do not conform to the clearing agency's local accounting and financial reporting requirements.[275]

c. Final Rule

We are adopting Rule 17Ad–22(c)(2) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We have also changed references to ''annual audited financial report'' to ''annual audited financial statements'' to be consistent with the term used in Regulation S–X. Furthermore, we have clarified that a registered clearing agency will be required to post its financial statements of income, changes in stockholders' equity and other comprehensive income and cash flows [276] within 60 days after the end of its fiscal year, which is consistent with the staff guidance on meeting the requirements of Section 17A in its Announcement of Standards for the Registration of Clearing Agencies.[277] The Commission believes that requiring the disclosure of the clearing agency's annual audited financial statements to be an additional layer of information about the activities and financial strength of the clearing agency that market participants may find useful in assessing their use of the clearing agency's services.[278]

Consistent with recommendations from commenters, we are adopting Rule 17Ad–22(c)(2) in a form that does not require a reconciliation to U.S. GAAP for clearing agency reports that are prepared using IFRS.[279] We appreciate the request made by commenters for the Commission to consider allowing non-U.S. based clearing agencies to prepare their financial statements in accordance with accounting standards generally accepted in their home jurisdiction so long as the financial statements are accompanied by a reconciliation to U.S. GAAP.[280] However, we also recognize the advantages of financial statement disclosure that are limited to more widely applied bases of accounting and may offer more utility to market participants, regulators and other stakeholders of clearing agencies. Therefore, we have limited the different bases of accounting upon which the annual audited financial statements may be prepared to IFRS and U.S. GAAP.

F. Minimum Standards for Registered Clearing Agencies: Rules 17Ad–22(d)(1)–(15)

Rule 17Ad–22(d) sets forth certain minimum standards regarding the operations of registered clearing agencies providing CCP or CSD services. The standards established in Rule 17Ad–22 address areas including: (1) Transparent and enforceable rules and procedures; (2) participation requirements; (3) custody of assets and

[271] *See* The DTCC (April) Letter at 7; *see also* Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed rule 17Ad-22 concerning standards for clearing agencies); LCH Letter at 1 (stating its general belief that the rules in the Proposing Release ''will help establish a comprehensive regulatory framework to reduce risk, increase transparency and promote market integrity within the financial system.'').

[272] *See* The DTCC (April) Letter at 7; ENY Letter at 2.

[273] *See* ENY Letter at 1.

[274] *See id.* at 2.

[275] *See id.*

[276] The added language, ''changes in stockholders' equity and other comprehensive income,'' does not change the substance of the rule as provided in the Proposing Release. This language has been added in the final rule to clarify the scope of what is meant by a complete set of financial statements consistent with customary industry accounting practices.

[277] *See* Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (June 23, 1980) (''Accordingly, a clearing agency should undertake in its rules to furnish to participants, within 60 days following the close of the clearing agency's fiscal year, unconsolidated audited comparative financial statements which are prepared in accordance with generally accepted accounting principles and are covered by a report prepared by its independent public accountant.'').

[278] The requirements of proposed Rule 17Ad–22(c)(2) concerning the audited annual financial statements would apply individually to each respective clearing agency.

[279] *See supra* note 273.

[280] *See supra* notes 274–275 and accompanying text.

investment risk; (4) operational risk; (5) money settlement risk; (6) cost-effectiveness; (7) links; (8) governance; (9) information on services; (10) immobilization and dematerialization of securities certificates; (11) default procedures; (12) timing of settlement finality; (13) delivery versus payment; (14) risk controls to address participants' failures to settle; and (15) physical delivery risks.

Like Rules 17Ad–22(b) and (c), Rule 17Ad–22(d) is designed to work in tandem with the Commission's existing mandate under Section 17A of the Exchange Act by establishing minimum standards for clearing agency operations. In particular, Congress directed the Commission to facilitate the establishment of (1) a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities) and (2) linked or coordinated facilities for clearance and settlement of transactions in securities, securities options, contracts of sale for future delivery and options thereon, and commodity options. [281] In using its authority, the Commission must consider the public interest, the protection of investors, the safeguarding of securities and funds, and the maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents.[282] When Congress established this system for the regulation of clearing agencies in 1975, Congress found that:

- The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.
- Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.
- New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.
- The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors. [283]

These findings serve as objectives in the Commission's ongoing efforts to enhance efficiency and reduce risk in the operation of the U.S. clearance and settlement system. Over the years, the Commission's view of the actions by a clearing agency that are necessary to meet these objectives as well as the other requirements in Section 17A has changed with prevailing market conditions and as new technologies are developed. For example, in the years after the October 1987 market break, the Commission worked to implement a number of changes in the securities markets, including the reduction of the standard settlement time frame for a securities transaction to the third day after the securities trade date (*i.e.,* T+3) and the conversion to a same-day funds settlement system.[284] In 2004, in a concept release titled *Securities Transaction Settlement,* the Commission noted at that time that (1) size and growth of the securities markets; (2) tighter linkages among markets and market participants; and (3) a possible wide-scale regional disruption prompted the Commission to consider shortening the standard T+3 securities settlement cycle even further to mitigate the possibility of systemic disruptions and to facilitate a more efficient clearance and settlement system.[285]

Over time, changes to the U.S. legal framework have also led to enhancements in the operation of the U.S. clearance and settlement system. For example, the adoption of Revised Article 8 of the Uniform Commercial Code in 1995 strengthened the laws governing the holding and transfer of securities.[286] In response, clearing agencies changed their rules to provide greater legal certainty to their direct investors and provide greater protection to investors.[287] Amendments to the U.S. bankruptcy code in 2005 similarly provided an opportunity for enhanced legal protections for clearing agencies and clearing agency participants.[288]

Consistent with these examples of how the Commission's approach to administrative oversight and practices by clearing agencies have changed over time to meet the objectives of Section 17A, the Commission believes that Rule 17Ad–22(d) creates standards for various aspects of the payment, clearance and settlement process and that to meet these standards clearing agencies will likely need to update their rules and procedures as market conditions evolve (*e.g.,* through new products and trading strategies), to keep pace with relevant changes in technology, and appropriately respond to other conditions.[289] The discussion below provides greater detail regarding each respective standard covered in Rules 17Ad–22(d)(1)–(15). As indicated in Section II.B the Commission intends to observe clearing agency practices as they are developed to establish, implement, maintain and enforce policies and procedures that are intended to achieve compliance with Rules 17Ad–22(d)(1)–(15). Monitoring those practices and through cognizance of changes in other relevant areas that affect a clearing agency's operation and governance, such as market conditions, technology, or international standards, the Commission may modify Rules 17Ad–22(d)(1)–(15) over time or adopt additional rules as appropriate. The Commission may also choose to issue further guidance concerning its rules for clearing agencies.

1. Rule 17Ad–22(d)(1): Transparent and Enforceable Rules and Procedures

a. Proposed Rule

Rule 17Ad–22(d)(1), as proposed, would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for a well-founded, transparent and enforceable structure for each aspect of their activities in all relevant jurisdictions.[290]

b. Comments Received

Commenters generally supported Rule 17Ad–22(d)(1).[291]

[281] *See* 15 U.S.C. 78q–1(a)(2)(A).

[282] *See* 15 U.S.C. 78q–1(b)(3)(A)–(I).

[283] *See* 15 U.S.C. 78q–1(a)(1).

[284] *See* 17 CFR 240.15c6–1; Exchange Act Release No. 34–26051 (Aug. 31, 1988), 53 FR 34852 (Sept. 8, 1988).

[285] *See Concept Release: Securities Transaction Settlement,* Release No. 34–49405 (Mar. 11, 2004).

[286] *See generally* James S. Rogers, *Policy Perspectives on Revised U.C.C. Article 8* (1996), Boston College Law School Faculty Papers, Paper 343, *available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1346&context=lsfp.*

[287] Securities and Exchange Act Release Nos. 39924 (Apr. 27, 1998), 63 FR 24584 (May 4, 1998) and 36781 (Jan. 26, 1996), 61 FR 3958 (Feb. 2, 1996).

[288] Bankruptcy Abuse Prevention and Protection Act of 2005, Public Law 109–8, 119 Stat. 23.

[289] *See supra* note 71.

[290] A relevant jurisdiction would include, among others, activities (1) In the United States, (2) involving any means of interstate commerce, or (3) in respect to providing clearing services to any U.S. person. For clearing agencies that operate in multiple jurisdictions, this also could include resolving possible conflicts of laws issues that the clearing agency may encounter.

[291] *See* The DTCC (April) Letter at 7 (noting its support for proposed Rule 17Ad–22(d)(1) as drafted); *see also* Better Markets Letter at 2 (stating generally that ''[i]n fashioning the rules, and in accordance with the Dodd-Frank Act, the

Continued

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(1) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We believe that well-founded, transparent and enforceable policies and procedures established to underpin a clearing agency's operational and business activities are essential to reduce legal risks and enhance a clearing agency's ability to facilitate the prompt and accurate clearance and settlement of securities transactions and safeguard securities and funds as required for the protection of investors by Section 17A of the Exchange Act.[292]

To achieve compliance with Rule 17Ad–22(d)(1), a clearing agency must have written policies and procedures [293] in place that, at a minimum, address the significant aspects of a clearing agency's operations and risk management to provide a well-founded legal framework and must be clear, internally consistent, and readily accessible by the public in order to provide a transparent legal framework. In addition, the clearing agency must be able to enforce its policies and procedures that contemplate enforcement by the clearing agency. Moreover, policies and procedures that govern or create remedial measures that a party other than the clearing agency (such as a clearing member) can undertake to seek redress or to promote compliance with applicable rules must be enforceable.[294] Examples of legal risk in the operation of a clearing agency include, among other things, the likelihood that the policies and procedures of a clearing agency are incomplete, opaque, or not enforceable and will therefore adversely affect the functioning of the clearing agency.[295] The Commission believes that it is helpful for a clearing agency to bear these risk factors in mind and that it should also consider the extent to which changes in the legal framework affecting the clearing agency may require changes to its organization and practices to ensure that the establishment, implementation, maintenance and enforcement of its policies and procedures continues to provide for a well-founded, transparent and enforceable structure that protects the interests of the clearing agency and its participants.

2. Rule 17Ad–22(d)(2): Participation Requirements

a. Proposed Rule

Rule 17Ad–2(d)(2), as proposed, would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency; have procedures in place to monitor that participation requirements are met on an ongoing basis; and have participation requirements that are objective, publicly disclosed, and permit fair and open access.

b. Comments Received

Some commenters supported proposed Rule 17Ad–22(d)(2).[296]

One commenter stated its specific preference for proposed Rule 17Ad–22(d)(2) to facilitate the Commission's regulation of access at clearing agencies compared to Rules 17Ad–22(b)(5), (6) and (7) for CCPs.[297] The commenter suggested that adoption of Rule 17Ad–22(d)(2), though not a prescriptive rule, would give the Commission a broad level of plenary authority over participant access to clearing agencies.[298]

One commenter recommended that the Commission should take an expansive, prescriptive approach to its rule requirements for clearing agency participation and participant monitoring.[299] The commenter asked that the Commission be more detailed in the requirements of its proposed rules that address participation standards, like Rule 17Ad–22(d)(2).[300] The commenter suggested that the Commission should apply this approach within several categories of clearing agency operation that it believes comprise risk management.[301]

One commenter supported the requirement in Rule 17Ad–22(d)(2) for clearing members to have written policies and procedures for risk management but also emphasized the importance of placing emphasis on practical experience in risk management.[302] The commenter urged the Commission to require that participants in a clearing agency must be able to participate in its default management process, which includes the ability to bid for the portfolios of other clearing members.[303] The commenter also stated that if a clearing agency admitted a clearing member that was unable to participate in default management, it would reduce available resources and liquidity, place heightened burdens on other clearing members, and reduce the likelihood that the clearing agency's risk management process would operate effectively.[304]

One commenter encouraged the Commission to prohibit clearing agencies from imposing rules or engaging in conduct that is prejudicial to indirect clearing participants compared to direct clearing participants (*e.g.,* with respect to eligibility or the timing of clearing or processing of trades), and stated that if a transaction satisfies a clearing agency's rules then the clearing process for that trade should be the same regardless of whether it involves direct or indirect clearing participants.[305]

Commission has appropriately taken into account international standards governing clearance and settlement''); Barnard Letter at 1 (supporting generally the thrust of the Commission's proposals in the Proposing Release, particularly proposed Rule 17Ad–22 concerning standards for clearing agencies); The OCC Letter at 7 (applauding the Commission generally for choosing to incorporate many aspects of the current CPSS–IOSCO Recommendations in the Proposing Release); LCH Letter at 1 (stating its general belief that the rules in the Proposing Release ''will help establish a comprehensive regulatory framework to reduce risk, increase transparency and promote market integrity within the financial system'').

[292] 15 U.S.C. 78q–1(a)(1)(A).

[293] Clearing agencies are SROs as defined in Section 3(a)(26) of the Exchange Act. A stated policy, practice, or interpretation of an SRO, such as a clearing agency's written policies and procedures, would generally be deemed to be a proposed rule change, unless (1) it is reasonably and fairly implied by an existing rule of the self-regulatory organization or (2) it is concerned solely with the administration of the self-regulatory organization and is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of a SRO's existing rule. *See* 17 CFR 240.19b–4.

[294] The Commission believes that Rule 17Ad–22(d)(1) would augment the Exchange Act requirement that the rules of the clearing agency must provide that its participants shall be appropriately disciplined for any violation of any provision of the rules of the clearing agency. *See* 15 U.S.C. 78q–1(b)(3)(G).

[295] *See generally* RSSS Recommendation 1, Legal Framework and RCCP Recommendation 1, Legal Risk, *supra* note 33.

[296] *See* The DTCC (April) Letter at 7; *see also* Better Markets Letter at 2; Barnard Letter at 1; The OCC Letter at 7; LCH Letter at 1.

[297] *See* The OCC Letter at 12.

[298] *See id.*

[299] *See* Barnard Letter at 1; ISDA Letter at 3–4.

[300] *See* ISDA Letter at 3–4.

[301] *See id.* (citing the following areas as components of a clearing agency's risk management framework: (1) Board and senior management oversight; (2) an organizational structure that conforms to the overall strategy and risk policy set by the board; (3) that individuals permitted to take risk on behalf of the clearing member have a strong understanding of the organization's risk profile, the products it trades, and approved trading limits; (4) risk management that is independent and reports directly to senior management or the board; and (5) strong systems and procedures for controlling, monitoring, and reporting risk (including for transactions with affiliates)).

[302] *See* ISDA Letter at 4.

[303] *See* ISDA Letter at 5.

[304] *See id.*

[305] *See* MFA (Kaswell) Letter at 7 (further stating that this includes ''barriers to competitive price

Some commenters expressed concern that clearing agency participants may rely on the resources and services of a third party to meet the requirements developed by clearing agencies pursuant to Rule 17Ad–22(d)(2).[306] One commenter expressed that it does not believe that a clearing member should be able to use a credit facility funding arrangement from an unaffiliated entity to satisfy financial resource requirements developed by a clearing agency pursuant to Rule 17Ad–22(d)(2).[307] The commenter noted that in this case the clearing member receives only a contractual right to funds, may need to attempt to enforce that right at a time of stressed liquidity, and does not have rights to monitor the financial resources of the liquidity facility.[308] The same commenter stated that participants should not be permitted to outsource default management.[309] It argued that preventing the outsourcing of default management arrangements is critical to mitigate risks associated with outsourcing.[310]

Several commenters argued that Rule 17Ad–22(d)(2) is only appropriate for CCPs.[311] As noted below, Rule 17Ad–22(d)(2) only applies to these entities.

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(2) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies.

Rule 17Ad–22(d)(2) is intended to reduce the likelihood of defaults by participants, while also providing flexibility for clearing agencies to tailor standards that are linked to the obligations of the participant. The Commission believes the rule fosters compliance with the requirement under Section 17A of the Exchange Act that the rules of a clearing agency must not be designed to permit unfair discrimination in the admission of participants by requiring standards that are designed to be measurable, open and fair.[312]

We agree with those commenters who supported Rule 17Ad–22(d)(2) as a mechanism to help ensure that clearing agencies meet the Exchange Act requirements in their participation standard practices.[313] However, we are not persuaded by the position that Rule 17Ad–22(d)(2) is so coextensive with the requirements of Rules 17Ad–22(b)(5), (6) and (7) that it renders the adoption of those rules unnecessary.[314] As discussed above, Rules 17Ad–22(b)(5), (6) and (7) are responsive to specific concerns about access to CCPs that have been brought to the attention of the Commission in connection with efforts to promote central clearing of security-based swaps by the financial services industry, government regulators and legislators in response to the recent financial crisis.[315] We believe that Rule 17Ad–22 promotes the compliance of all clearing agencies with the requirement in Section 17A of the Exchange Act that a clearing agency's rules may not be designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency. We also believe this complements the design of Rules 17Ad–22(b)(5), (6) and (7) to specifically promote compliance with the fair access requirement by CCPs.

We agree with commenters that comprehensive and explicit requirements are an appropriate part of a clearing agency's risk management framework, including participation standards.[316] We also agree with commenters who stated that it is important for the Commission to promote clearing agencies' use of practical experience in establishing, implementing, maintaining and enforcing their policies and procedures concerning participation standards and that the inability of a clearing member to participate in the default management process during a default would be problematic.[317] Accordingly, we believe that it is important to allow clearing agencies enough flexibility to use their market experience to shape the rules, policies and procedures addressing participation standards and for the Commission to oversee the suitability of those standards through its oversight, including the SRO rule filing process, periodic inspections and examinations, and day-to-day monitoring of the activities of clearing agencies. Because of the importance of clearing agency flexibility and the existing oversight mechanisms, the Commission declines to adopt more prescriptive requirements under Rule 17Ad–22(d)(2) at this time.

We agree with commenters that credit facility arrangements represent a contractual right to funds and that enforcement of that contractual right may become more difficult during stressed market conditions.[318] However, we do not believe that the rule should completely prohibit participants from using credit facility arrangements with an unaffiliated entity to satisfy financial resource requirements to a clearing agency because such credit facility arrangements can be an important tool that allows clearing agencies to access liquidity quickly in times of stress avoiding an immediate need to liquidate assets. Instead, we expect clearing agencies to use their expertise to establish rules, policies and procedures that properly reflect the extent to which credit facility arrangements are appropriate for participants at the particular clearing agency based on the particular clearance and settlement services it provides.

We agree with commenters who stated that clearing agencies should not process trades differently on the sole basis of whether the trade is between direct clearing members or involves participants that access the clearing agency through those clearing members, and so the Commission does not find it necessary to create disparate standards for the treatment of direct and indirect participants.[319]

3. Rule 17Ad–22(d)(3): Custody of Assets and Investment Risk

a. Proposed Rule

Proposed Rule 17Ad–22(d)(3) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a manner whereby risk of loss or of delay in access to them is minimized, and invest in instruments with minimal credit, market and liquidity risks. Compliance with the requirement is intended to improve the ability of the clearing agency to meet its settlement

provision by a liquidity provider that is an indirect clearing participant versus a direct clearing participant'' because ''when an indirect clearing participant trades with another indirect clearing participant, the clearing process should be identical and as prompt as when one of the parties is a direct clearing participant so long as the transaction satisfies the relevant clearing agency's rules, requirements and standards otherwise applicable to such trades.''); MFA (Baker) Letter Attachment 1, at 1.

[306] *See* ISDA Letter at 4–5.

[307] *See* ISDA Letter at 4.

[308] *See id.*

[309] *See* ISDA Letter at 5.

[310] *See id.* (noting (1) the fact that the third party does not ''have skin in the game'' and (2) the third party service provider could inappropriately bind a clearing member to accept positions from a defaulting clearing member that it is not equipped to handle. The commenter also pointed out that conflicts of interest could exacerbate these risks if the third party service provider is operated by a competing clearing member).

[311] *See* Omgeo Letter at 10; TriOptima Letter at 6–7.

[312] 15 U.S.C. 78q–1(b)(3)(F).

[313] *See supra* note 296.

[314] *See supra* note 297.

[315] *See* discussion *supra* Section II.B.

[316] *See supra* notes 299–300.

[317] *See supra* note 302 and accompanying text.

[318] *See supra* notes 306–308 and accompanying text.

[319] *See supra* note 305 and accompanying text.

obligations by reducing the likelihood that assets securing participant obligations to the clearing agency would be unavailable or insufficient when the clearing agency needs to draw on them.

b. Comments Received

Some commenters expressed concerns about the application and scope of proposed Rule 17Ad–22(d)(3). One commenter stated that proposed Rule 17Ad–22(d)(3) is not sufficiently clear in its scope.[320] The commenter urged the Commission to make clear that Rule 17Ad–22(d)(3) applies only to the assets of the clearing agency that are available to facilitate settlement in the event of a participant default and not those assets that are held in custody by the clearing agency.[321]

However, another commenter asked the Commission to clarify that proposed Rule 17Ad–22(d)(3) applies to customer assets only and not to the assets of the clearing agency (or its sponsor).[322] The commenter noted that by defining the scope of Rule 17Ad–22(d)(3) that way the rule would not apply to clearing agencies that perform post-trade processing services (*e.g.,* compression or collateral management) and do not take in or retain any assets of their users.[323] An additional commenter agreed that Rule 17Ad–22(d)(3) should not apply to clearing agencies that do not hold assets on behalf of participants.[324]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(3) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. The Commission believes that Rule 17Ad–22(d)(3) strengthens the requirement in Section 17A(b)(3)(F) of the Exchange Act that the rules of a clearing agency must be designed to ensure the safeguarding of securities and funds in the custody or control of the clearing agency or for which the clearing agency is responsible.[325] Because the purpose of Rule 17Ad–22(d)(3) is to help ensure assets are available in the event of a participant default, Rule 17Ad–22(d)(3) would apply to all assets held by a clearing agency that may be used for that purpose. However, the Commission notes that Rule 17Ad–22(d)(3) may not apply to the assets of a participant's customer depending on how a clearing agency's operations are structured. The Commission does not expect that registered clearing agencies would need to rely on their physical assets, such as computers, furniture and buildings, to cover a participant default under the rule.

We appreciate the concerns expressed by commenters who asked the Commission to clarify how Rule 17Ad–22(d)(3) applies in the context of the different services that a clearing agency may perform, and note that Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities that are exempt from registration as a clearing agency.

4. Rule 17Ad–22(d)(4): Identification and Mitigation of Operational Risk

a. Proposed Rule

Rule 17Ad–22(d)(4), as proposed, would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify sources of operational risk and minimize these risks through the development of appropriate systems, controls, and procedures; implement systems that are reliable, resilient and secure and have adequate scalable capacity; and have business continuity plans that allow for timely recovery of operations and ensure the fulfillment of a clearing agency's obligations.

Rule 17Ad–22(d)(4) should help to ensure that clearing agencies are able to operate with minimal disruptions, even during times of market stress when there may be greater demands on their systems due to higher volume. In addition, the rule would require that clearing agencies have business continuity plans that allow for timely recovery of operations and ensure the fulfillment of a clearing agency's obligations. This requirement would be relevant in the event of, among other things, deficiencies in information systems or internal controls, human errors, management failures, unauthorized intrusions into corporate or production systems, or disruptions from external events such as natural disasters.

b. Comments Received

Several commenters recommended that the rule should not apply to the activities of clearing agencies that perform post trade processing services. For example, one commenter reasoned that the application of proposed Rule 17Ad–22(d)(4) to a clearing agency that performs post-trade comparison services is unnecessary if that clearing agency is operating pursuant to a conditional exemptive order from the Commission.[326] The commenter stated that the conditions of an exemptive order can be tailored to provide the Commission with sufficient regulatory oversight of a clearing agency's operational risks.[327]

Another commenter expressed its view that operational risk management and disaster recovery systems are critical to any well-founded compression service or collateral management service.[328] However, the commenter argued that a clearing agency that performs those services should be free to implement and amend such procedures as it considers necessary to operate its business without undue regulatory delay or oversight.[329]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(4) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We believe that Rule 17Ad–22(d)(4) complements the existing guidance provided by the Commission in its Automation Review Policy Statements[330] and the *Interagency*

[320] *See* The DTCC (April) Letter at 21.

[321] *See* The DTCC (April) Letter at 21–22 (remarking that it believes this ambiguity is also contained in RCCP 7: Custody and investment risks on which Rule 17Ad–22(d)(3) is modeled but noting that proposed language for FMI Principle 16: Custody and investment risk would resolve that ambiguity and asking the Commission to revise Rule 17Ad–22(d)(3) as follows to make clear that the requirements of the rule do not apply to assets of participants held in custody: ''(d) Each clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable: (3) Hold its assets in a manner whereby risk of loss or of delay in its access to them is minimized; and invest such assets in instruments with minimal credit, market and liquidity risks'').

[322] *See* TriOptima Letter at 7.

[323] *See id.*

[324] *See* Omgeo Letter at 10.

[325] 15 U.S.C. 78q–1(b)(3)(F).

[326] *See* Omgeo Letter at 10.

[327] *See id.* (identifying such measures as making the clearing agency subject to: (1) The Commission's Automation Review Program, (2) regular audits by Commission staff, (3) annual reports to the Commission, (4) a duty to report systems outages to the Commission, and (5) on-site inspections by Commission staff of the clearing agency's facilities).

[328] *See* TriOptima Letter at 7–8.

[329] *See id.* (supporting its position through assertions that: (1) The robustness of a compression service's systems will be a competitive issue that will be determinant of the commercial viability of the compression service; (2) compression services do not represent a systemic risk to the viability of the market because collateral management providers merely run a set of calculations for collateral management purposes; (3) systems integrity is a central feature of the provider's contractual framework and system design and, ultimately, its ability to attract users; and (4) the risk of data loss is, in practice, very small).

[330] *See Automated Systems of Self-Regulatory Organizations,* Exchange Act Release No. 34–27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989); *Automated Systems of Self-Regulatory*

White Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System.[331] We also believe that Rule 17Ad–22(d)(4) helps to address risks posed by potential operational deficiencies to a clearing agency and its participants and therefore supports the requirement in Section 17A of the Exchange Act that a clearing agency must be so organized and have the capacity to be able to facilitate prompt and accurate clearance and settlement. Finally, Rule 17Ad–22(d)(4) does not require clearing agencies to eliminate all operational risks. Instead, the rule provides registered clearing agencies with the ability to consider the relevant trade-offs between cost and risk reduction. The rule provides this ability by allowing registered clearing agencies, subject to Commission oversight, to develop systems, controls, and procedures that are ''appropriate'' in response to the identified risks.[332]

As discussed above, Rule 17Ad–22 applies only to registered clearing agencies. It does not apply to entities that perform post-trade processing services or that are exempt from registration as a clearing agency. As discussed above, entities that perform certain post trade processing services, and that fall within the definition of clearing agency, may be subject to different rulemaking by the Commission at a later time.[333]

5. Rule 17Ad–22(d)(5): Money Settlement Risks

a. Proposed Rule

Proposed Rule 17Ad–22(d)(5) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to employ money settlement arrangements that eliminate or strictly limit the clearing agency's settlement bank risks, that is, its credit and liquidity risks from the use of banks to effect money settlements with its participants, and require funds transfers to the clearing agency to be final when effected. Money settlement arrangements, among other things, are meant to reduce the risk that financial obligations related to the activities of the clearing agency are not timely settled or discharged with finality. Generally, money settlement by a clearing agency and its participants involves the use of a settlement bank [334] as an intermediary. Failure by the settlement bank to effectuate timely and final settlement adversely affects the clearing agency by exposing it to credit and liquidity pressures that in turn can destabilize the clearing agency's ability to facilitate prompt and accurate clearance and settlement.

The Commission is providing clearing agencies with flexibility to implement arrangements in a manner fit for them to meet the requirement of the rule. The Commission notes that there are a number of arrangements that clearing agencies could establish to comply with the rule, including criteria for use of settlement banks that address the banks' creditworthiness, access to liquidity, and operational reliability, and legal agreements with settlement banks to ensure that funds transfers to the clearing agency are final when affected.

b. Comments Received

One commenter stressed that if the Commission adopts Rule 17Ad–22(d)(5) as proposed then the Commission should clarify that a clearing agency cannot eliminate all exposure to settlement bank risk.[335] The commenter pointed out that even if a clearing agency uses an account at a U.S. Federal Reserve bank to make settlement with participants, the clearing agency is still exposed to the settlement risk of the commercial banks that are used by clearing agency participants.[336]

The same commenter stressed that the Commission should not mandate a minimum number of settlement banks and that the requirements of Rule 17Ad–22(d)(5) should focus on providing clearing agencies with discretion to select settlement banks with care, diversifying risk among those settlement banks to the extent practicable, and monitoring their financial status.[337]

Two commenters argued that proposed Rule 17Ad–22(d)(5) should be applicable only to clearing agencies that take in or process securities or funds from users.[338]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(5) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We believe Rule 17Ad–22(d)(5) limits the potential that a clearing agency's money settlement arrangements will cause the clearing agency to face higher levels of credit and liquidity risks. In addition, the Commission believes that the rule is consistent with the requirement of Section 17A(b)(3)(F) of the Exchange Act, which requires the rules of a clearing agency to be designed to assure the safeguarding of securities and funds that are in the custody or control of the clearing agency or for which it is responsible.[339]

As noted, some commenters pointed out that a clearing agency may not be positioned to eliminate all exposure to credit and liquidity risks from the use of banks to effect money settlements.[340] For example, we agree that even if a clearing agency elects to use an account at a U.S. Federal Reserve bank to make settlement with participants, the clearing agency is still exposed to the settlement risk of the banks chosen by clearing agency participants. The Commission notes however that Rule 17Ad–22(d)(5) does not require a clearing agency to completely eliminate settlement bank risks. Instead, the clearing agency must establish, implement, maintain and enforce written policies and procedures reasonably designed to employ money settlement arrangements that eliminate or strictly limit the clearing agency's settlement bank risks. We believe clearing agencies have the authority

Organizations (II), Release No. 34–29815 (May 9, 1991), 56 FR 22489 (May 15, 1991) (''Automation Review Policy Statements''). Generally, the guidance in the Automation Review Policy Statements provides for the following activities by clearing agencies: (1) Performing periodic risk assessments of its automated data processing (''ADP'') systems and facilities; (2) providing for the selection of the clearing agency's independent auditors by non-management directors and authorizing such non-management directors to review the nature, scope, and results of all audit work performed; (3) having an adequately staffed and competent internal audit department; (4) furnishing annually to participants audited financial statements and an opinion from an independent public accountant as to the clearing agency's system of internal control—including unaudited quarterly financial statements also should be provided to participants upon request; and (5) developing and maintaining plans to assure the safeguarding of securities and funds, the integrity of the ADP system, and recovery of securities, funds, or data under a variety of loss or destruction scenarios.

[331] *See* Exchange Act Release No. 47638 (Apr. 7, 2003), 68 FR 17809 (Apr. 11, 2003), *available at http://www.sec.gov/news/studies/34-47638.htm.*

[332] See discussion supra Section I.A.2.

[333] *See* discussion *supra* Section II.B.4 and Section III.A.

[334] A settlement bank is a bank that is used to effect money settlements between a central counterparty and its participants.

[335] *See* The OCC Letter at 14.

[336] *See id.*

[337] *See id.*

[338] *See* Omgeo Letter at 11; TriOptima Letter at 8 (stating that the proposed rule should not apply to compression services and collateral management providers that do not hold or process any of their users' assets).

[339] 15 U.S.C. 78q–1(b)(3)(F).

[340] *See supra* notes 335–336 and accompanying text.

through their rules to shape the settlement bank practices in order to achieve that outcome. We also agree with commenters that clearing agencies should retain discretion, subject to Commission oversight, to establish rules governing settlement bank practices with participants that are tailored to the operations of the clearing agency.[341]

As discussed above, Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities that are exempt from registration as a clearing agency except to the extent specifically contemplated by the terms of a future exemption.

6. Rule 17Ad–22(d)(6): Cost-Effectiveness

a. Proposed Rule

Rule 17Ad–22(d)(6), as proposed, would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to be cost-effective in meeting the requirements of participants while maintaining safe and secure operations.

Having clearing agencies be mindful of the costs that are incurred by their participants, while maintaining such compliance, should help to reduce inefficiencies in the provision of clearing agency services. This point is particularly important in circumstances where clearing agencies may not be subject to strong competitive forces (such as when there is only one clearing agency for an asset class) for the provision of their services and therefore may have less of an incentive to be cost-effective in meeting the requirements of participants. Accordingly, the Commission believes the rule should potentially help reduce the costs incurred for clearing agency services while also maintaining appropriate standards for a clearing agency's operations.

b. Comments Received

Two commenters expressed reservations about the rule.[342] One commenter stated that it is unnecessary to apply proposed Rule 17Ad–22(d)(6) to a clearing agency if the Commission already regulates the cost-effectiveness of that clearing agency through conditions in an exemptive order.[343]

Another commenter stressed that unless a provider of compression or collateral management services is systemically important, or market participants are obliged to purchase its services, then it should be free to set fees in a fair and commercial manner that encourages broad participation while permitting sufficient flexibility to offer favorable rates to high-volume users, early adopters, magnet clients and other key participants.[344] The commenter added that portfolio compression and collateral management are service areas in which cost effectiveness is a dominant part of commercial viability and that those services today do not represent a systemic risk to the viability of the markets.[345]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(6) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. As discussed above, the Commission believes Rule 17Ad–22(d)(6) is appropriate and serves to advance the statutory goals of prompt and accurate clearance and settlement.[346] Specifically, the rule should help reduce the costs incurred for clearing agency services by requiring registered clearing agencies to be mindful of costs incurred by their participants, which may include keeping fees lower for participants, while also requiring that registered clearing agencies maintain safe and secure operations.

With regard to suggestions that Rule 17Ad–22(d)(6) should not apply to entities that perform certain post-trade services (*i.e.,* comparison of trade data, collateral management and compression/tear-up services),[347] or a clearing agency through the conditions of an exemptive order rather than the requirements of Rule 17Ad–22(d)(6),[348] we note that Rule 17Ad–22 only applies to CCPs and CSDs and does not apply to entities exempt from registration as clearing agency except to the extent specifically contemplated by the terms of a future exemption.

7. Rule 17Ad–22(d)(7): Links

a. Proposed Rule

Rule 17Ad–22(d)(7), as proposed, would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to evaluate the potential sources of risks that can arise when the clearing agency establishes links either cross-border or domestically to clear or settle trades, and to ensure that these risks are managed prudently on an ongoing basis. Tying the operations of different clearing agencies together by link arrangements potentially exposes a clearing agency and its members to the risk that the other entity may experience a financial loss or is otherwise unable to meet its settlement obligations that causes the clearing agency or its members to fail to meet their obligations.[349] Although the design and operation of each link will present a unique risk profile, clearing agencies potentially face legal, operational, credit and liquidity risks from link arrangements. In addition, because links can create interdependencies, clearing agencies may be affected by systemic risk if there are deficiencies in these arrangements. The Commission believes that requiring clearing agencies to evaluate and monitor any link arrangements they maintain is essential to protect the marketplaces that clearing agencies serve because the requirement would reduce the likelihood that such arrangements perpetuate risks that could create disruptions in the operations of clearing agencies.

b. Comments Received

Three commenters expressed concerns about the rule.[350] One commenter expressed concern that proposed Rule 17Ad–22(d)(7) is not sufficiently clear in scope.[351] Specifically, the commenter stated that it is not entirely clear whether the rule applies only to links between clearing agencies or may also apply to other ''links'' and any other entities that may be involved in the process of clearing and settling trades.[352] Accordingly, the

[341] *See supra* note 337 and accompanying text.

[342] *See* Omgeo Letter at 11; TriOptima Letter at 8.

[343] *See* Omgeo Letter at 11 (''[P]ursuant to Omgeo's Exemptive Order, Omgeo may not charge its customers more for use of its central matching services than Omgeo charges its customers when all counterparties are customers of Omgeo. Moreover, because DTCC, which is industry-owned, is the majority owner of Omgeo's Class A Interests, which controls the U.S. regulated aspects of Omgeo's business, DTCC can influence the prices Omgeo charges for its U.S. regulated services. This system has worked well, and therefore application of Proposed Rule 17Ad–22(d)(6) to Omgeo is unnecessary'').

[344] *See* TriOptima Letter at 8.

[345] *See id.*

[346] *See supra* note 1.

[347] *See supra* notes 344–345 and accompanying text.

[348] *See supra* note 343 and accompanying text.

[349] A clearing agency may be required to enter into a participant agreement with the other clearing organization as part of the link arrangement, which includes sharing in the loss allocations of that clearing organization. *See RCCP* 4.10.6, *supra* note 33.

[350] *See* The DTCC (April) Letter at 22; TriOptima Letter at 9; Omgeo Letter at 12.

[351] *See* The DTCC (April) Letter at 22.

[352] *See id.* (providing examples of these other types of links such as those that a clearing agency may establish with a data processor, pricing service, custodian bank, transfer agent or liquidity provider).

commenter asked the Commission to revise the proposed rule text for 17Ad–22(d)(7).[353] An additional commenter suggested that proposed Rule 17Ad–22(d)(7) should be modified to encourage prudent portfolio compression and collateral management services globally.[354] One commenter argued that it should not be subject to Rule 17Ad–22(d)(7) because it is already subject to the conditions of an exemptive order from clearing agency registration by the Commission.[355]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(7) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. We believe the rule is consistent with and furthers the purposes of the Exchange Act. Section 17A(a)(1)(D) of the Exchange Act states that the linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.[356] Further, Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a clearing agency foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[357]

The Commission agrees with the suggestion from some commenters that the specific type of link arrangements contemplated by Rule 17Ad–22(d)(7) is link arrangements between clearing agencies.[358] The Commission notes however that under Section 17A(b)(3)(F) of the Exchange Act, a clearing agency is charged with responsibility to coordinate with persons engaged in the clearance and settlement of securities transactions, not just other clearing agencies.[359] Accordingly, we have not amended the text of Rule 17Ad–22(d)(7) from the proposal. Further, the Commission notes that during the clearance and settlement process, a registered clearing agency is confronted with a variety of risks that must be identified and understood if they are to be effectively controlled.[360] To the extent that these risks arise as a result of a registered clearing agency's links with another entity involved in the clearance and settlement process, Rule 17Ad–22(d)(7) should help ensure that clearing agencies have policies and procedures designed to identify those risks.

Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities that are exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

8. Rule 17Ad–22(d)(8): Governance

a. Proposed Rule

Proposed Rule 17Ad–22(d)(8) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Exchange Act applicable to clearing agencies,[361] to support the objectives of owners and participants, and to promote the effectiveness of the clearing agency's risk management procedures.[362]

b. Comments Received

Two commenters registered their preference for what they regard as the principles-based approach in proposed Rule 17Ad–22(d)(8) to regulation of clearing agency governance rather than the prescriptive rules set forth in the Commission's proposed Regulation MC applicable to the security-based swap clearing agencies.[363] One commenter urged the Commission not to adopt hard and fast standards that will be costly to implement and maintain and yield little or no apparent corresponding regulatory benefits.[364]

One commenter urged the Commission to ensure that Rule 17Ad–22(d)(8) as well as any requirements adopted from the Commission's proposed Regulation MC pertaining to the mitigation of conflicts of interest are designed to ensure that buy-side market participants have a meaningful voice in the operating committees of clearing agencies because that representation is critical to promoting robust governance arrangements at clearing agencies and serving the best interests of the U.S. financial system.[365] Another commenter stated that proposed Rules 17Ad–22(d)(8), 17Ad–25, and 17Ad–26 reflect a better approach to governance, conflicts of interest, and board and committee composition than the Commission's proposed requirements for clearing agencies under Regulation MC.[366]

One commenter urged the Commission to consider complementing proposed Rule 17Ad–22(d)(8) with a minimum board independence requirement so that at least two-thirds of all board directors would be required to be independent.[367]

Several commenters made recommendations to the Commission concerning the application of Rule 17Ad–22(d)(8) to clearing agencies that perform post-trade processing services.[368] One commenter stated that if the Commission interprets proposed Rule 17Ad–22(d)(8) to be applicable to

[353] *See* The DTCC (April) Letter at 23 (requesting that Rule 17Ad–22(d)(7) be revised as follows: ''Each clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, evaluate the potential sources of risks that can arise when the clearing agency establishes links with other central counterparties or central securities depositories either cross-border or domestically to clear trades, and ensure that the risks are managed prudently on an ongoing basis.'').

[354] *See* TriOptima Letter at 9 (noting its belief that regulations that restrict the global availability of compression services and collateral management services will necessarily reduce the effectiveness of the risk-management service, by reducing the geographic scope of counterparties to which domestic users can connect). The commenter expressed its views on modifying Rule 17Ad–22(d)(7) in the larger context of its belief ''that the registration requirement with respect to [portfolio compression services and] * * * collateral management services is inappropriate and would place unnecessary burdens on entities providing swap market participants useful back-office tools that are intended to improve the efficiency of collateral management systems in a manner that reduces systemic risk.'' *See* TriOptima Letter at 1.

[355] *See* Omgeo Letter at 12 (suggesting that its exemptive order is the oversight mechanism that strikes the appropriate balance to govern its link arrangements because its link arrangements (1) do not involve the handling of securities or funds; (2) provide for standardization and processing of information in a uniform and efficient manner; and (3) disruptions to its link arrangements are of a different type and are far less significant than disruptions in the linkages of registered clearing agencies).

[356] 15 U.S.C. 78q–1(a)(1)(D).

[357] 15 U.S.C. 78q–1(b)(3)(F).

[358] *See supra* note 352.

[359] 15 U.S.C. 78q–1(b)(3)(F).

[360] *See RCCP, supra* note 33, at 39.

[361] Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a clearing agency be designed to protect investors and the public interest. 15 U.S.C. 78q–1(b)(3)(F).

[362] Rule 17Ad–22(d)(8) would complement other applicable requirements concerning governance at clearing agencies that may also separately apply. These other requirements include the existing regulatory framework of Section 17A of the Exchange Act and the related requirements contemplated by proposed Rule 17Ad–25, as well as Section 765 of the Dodd-Frank Act with respect to security-based swap clearing agencies. *See supra* Section III.F (stating that clearing agencies be required to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify and address existing or potential conflicts of interest). *See also* Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010), *supra* note 231.

[363] *See* CME Letter at 3; The OCC Letter at 14 (referencing the Commission's proposed requirements for clearing agencies in Regulation MC).

[364] *See* CME Letter at 4.

[365] *See* BlackRock Letter at 2.

[366] *See* The DTCC (April) Letter at 8.

[367] *See* CII Letter at 1.

[368] *See* TriOptima Letter at 9; Omgeo Letter at 12.

clearing agencies that perform post-trade processing services for security-based swaps (*e.g.,* comparison of data, portfolio compression and collateral management) then the governance requirements should be commensurate with the low risk presented by those service providers because requirements that are unduly onerous would impose unnecessary burdens and costs.[369] Another commenter argued that application of proposed Rule 17Ad–22(b)(8) to a clearing agency is unnecessary in cases when an industry utility has such a significant influence over a clearing agency's management and operation that the clearing agency's governance is already appropriately transparent to fulfill the public interest.[370]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(8) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. Rule 17Ad–22(d)(8) is designed to promote these types of arrangements and the ability of a clearing agency to serve the interests of its various constituents and the interests of the general public while maintaining prudent risk management processes to promote prompt and accurate clearance and settlement.

Governance arrangements have the potential to play an important role in making sure that clearing agencies fulfill the Exchange Act requirements that the rules of a clearing agency be designed to protect investors and the public interest and to support the objectives of owners and participants. Similarly, governance arrangements may promote the effectiveness of a clearing agency's risk management procedures by creating an oversight framework that fosters a focus on the critical role that risk management plays in promoting prompt and accurate clearance and settlement.[371]

We appreciate the perspective of commenters who prefer the more general policies and procedures design of Rule 17Ad–22(d)(8) to any more prescriptive rulemaking by the Commission in the area of clearing agency governance.[372] We agree that Rule 17Ad–22(d)(8) provides an important element of discretion to a clearing agency to be able to use its experience and expertise to hone policies and procedures for governance arrangements that support the clearing agency's particular operations. Even so, we are not persuaded by the assertions that more prescriptive Commission rules to address clearing agency governance practices would necessarily be disproportionately costly to implement and maintain when compared to potential countervailing benefits.[373] We continue to perform a careful review and evaluation of the comments that the Commission received on proposed Rules 17Ad–25, 17Ad–26 and Regulation MC, which commenters rightly observed represent separate, and in some cases more prescriptive, proposed requirements related to clearing agency governance and mitigation of conflicts of interest.

At this time, the Commission also is not acting on the recommendation of some commenters to structure Rule 17Ad–22(d)(8) so that it would require at least two-thirds of a clearing agency's board of directors to be independent.[374] Proposed Rule 17Ad–26 and Regulation MC address whether and how to require some degree of independent representation on the board of a clearing agency. We believe it is more appropriate to consider those issues in connection with the Commission's ongoing consideration of those rules.

With regard to suggestions that Rule 17Ad–22(d)(8) should not apply to entities that perform certain post-trade services (*i.e.,* comparison of trade data, collateral management and compression/tear-up services),[375] we note that Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

We are not persuaded by the argument that the operation of a clearing agency through a utility model negates the need for Rule 17Ad–22(d)(8) because regardless of the business model adopted, the board should reflect the interests of the full range of stakeholders in order to effective. [376] In response to comments that the rule should apply to a clearing agency in a way that is commensurate with the risk of its services,[377] the Commission expects that not all policies and procedures established by clearing agencies to satisfy Rule 17Ad–22(d)(8) will be the same. Instead, to be useful to a clearing agency and its interested parties, the policies and procedures should necessarily reflect the unique relationships at that clearing agency between the scope of its operations and its governance and risk management needs.

9. Rule 17Ad–22(d)(9): Information on Services

a. Proposed Rule

Proposed Rule 17Ad–22(d)(9) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide market participants with sufficient information for them to identify and evaluate the risks and costs associated with using the clearing agency's services.

The Commission believes that requiring a clearing agency to disclose information sufficient for participants to identify risks and costs associated with using the clearing agency will allow participants to make informed decisions about the use of the clearing agency and take appropriate actions to mitigate their risks and costs associated with the use of the clearing agency.

b. Comments Received

One commenter stated that it does not believe that the proposed rule is necessary because among other things a clearing agency's fees, collateral deposits, and operational requirements are already included in the clearing agency's rules and its published procedures and are already required to be sufficiently available to market participants and the public at large.[378]

Two commenters expressed that application of proposed Rule 17Ad–22(d)(9) to clearing agencies that do not handle securities or funds is unnecessary.[379]

c. Final Rule

We are adopting Rule 17Ad–22(d)(9) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies We believe that requiring a clearing agency to have policies and procedures that require a clearing agency to disclose

[369] *See* TriOptima Letter at 9.

[370] *See* Omgeo Letter at 12.

[371] The role of governance arrangements in promoting effective risk management has also been a focus of rules recently proposed by the Commission to mitigate conflicts of interest at security-based swap clearing agencies. *See* Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

[372] *See supra* note 364.

[373] *See id.*

[374] *See supra* note 367.

[375] *See supra* notes 368–370.

[376] *See supra* note 370 and accompanying text.

[377] *See supra* note 369 and accompanying text.

[378] *See* The OCC Letter at 15.

[379] *See* Omgeo Letter at 12; *see also* TriOptima Letter at 9 (noting that compression services and collateral management services operate on the basis of clear, standardized documentation and present few risks to users. If a compression cycle or collateral management service fails, the users' pre-existing transactions remain in effect and the risks can be disclosed in user documentation).

sufficient information so that participants can identify risks and costs associated with using the clearing agency will allow participants to make informed decisions about the use of the clearing agency and take appropriate actions to mitigate their risks and costs associated with the use of the clearing agency. While the rule provides clearing agencies flexibility to determine how to adequately disclose information so participants can identify and evaluate risks and costs associated with participation, the Commission believes that disclosure of the clearing agency rulebook, the costs of its services, a description of netting and settlement activities it provides, participants' rights and obligations, information regarding its margin methodology, and information regarding the extreme but plausible scenarios that the clearing agency uses to stress test its margin requirements are among the categories of information that participants could use to identify and evaluate risks and costs associated with use of the clearing agency. The Commission also believes that it is reasonable to expect that the type of information and level of detail that market participants will consider to be sufficient will evolve over time and therefore clearing agencies should seek to establish regular channels of communication with market participants and processes for continuously improving their disclosure practices as the marketplace changes over time.

Because clearing agencies are SROs, their rules are published by Commission and are generally available on each clearing agency's Web site. Nevertheless, discrete rule proposals do not necessarily provide a complete picture of a clearing agency's operations and the risk mitigation procedures. Accordingly, the rule is intended to promote a better understanding among market participants of a clearing agency's operations. A better understanding should foster confidence in the clearing agency's ability to manage those risks and costs, including, but not limited to, any margin requirements, restrictions or limitations of the clearing agency's obligations, and conditions used by the clearing agency to test the adequacy of its financial resources.

We acknowledge that existing requirements address the need for clearing agencies to incorporate matters such as the clearing agency's fees, collateral deposits, and operational requirements in its rules and procedures, which are already made available to market participants and the public.[380] The Commission is also aware that under Rule 17Ad–22(d)(9), the nature of the information that clearing agencies must provide, how frequently it must be provided, and who is entitled to receive it are all aspects of compliance with Rule 17Ad–22(d)(9) that implicate concerns by clearing agencies about protection of their proprietary information.[381] We believe that the nature and extent of information that is required to be provided under Rule 17Ad–22(d)(9) should be tailored to the needs of market participants based on the risks and costs to which they are exposed. Clearing agencies are expected to establish such tailored approaches in their policies and procedures designed to achieve compliance with Rule 17Ad–22(d)(9).

We agree with commenters who recommended that Rule 17Ad–22(d)(9) should only apply categorically to clearing agencies that take in or process securities or funds. Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency except to the extent specifically contemplated by a future exemption.

10. Rule 17Ad–22(d)(10): Immobilization and Dematerialization of Securities Certificates

a. Proposed Rule

Proposed Rule 17Ad–22(d)(10) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to immobilize[382] or dematerialize[383] securities certificates and transfer them by book entry to the greatest extent possible when the clearing agency provides CSD services.[384]

The Commission believes that the immobilization and dematerialization of securities and their transfer by book entry results in reduced costs and risks associated with securities settlements and custody by removing the need to hold and transfer many, if not most, physical certificates.[385] The Commission also believes that the proposed rule strengthens the requirement in Section 17A(b)(3)(F) of the Exchange Act for the rules of a clearing agency to assure the safeguarding of securities and funds that are in the custody or control of the clearing agency or for which it is responsible.[386]

b. Comments Received

One commenter expressed concern that proposed Rule 17Ad–22(d)(10) places responsibilities on clearing agencies that perform CSD services to immobilize or dematerialize securities that are beyond the clearing agency's control. Therefore, the commenter requested that the rule be revised to reflect the need for cooperation from market participants and regulators.[387]

Another commenter stated its belief that the proposed Rule 17Ad–22(d)(10) should not apply to portfolio compression and collateral management services for security-based swaps.[388]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(10) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. Rule 17Ad–22(d)(10) does not require a clearing agency to take any actions that are beyond the scope of its rules, procedures and operations. We agree that collaboration between regulators, market participants, and clearing agencies is necessary to achieve total immobilization or dematerialization of securities

[380] *See supra* note 378.

[381] *See id.*

[382] Immobilization refers to any circumstance where an investor does not receive a physical certificate upon the purchase of securities or is required to physically deliver a certificate upon the sale of securities.

[383] Dematerialization is the process of eliminating physical certificates as a record of security ownership.

[384] *See* proposed Rule 17Ad–22(a)(2) for definition of ''central securities depository services.'' DTC is currently the only registered clearing agency that provides central securities depository services.

[385] By concentrating the location of physical securities in a single central securities depository, clearing agencies are able to centralize the operations associated with custody and transfer and reduce costs through economies of scale. Virtually all mutual fund securities, government securities, options, and municipal bonds in the United States are dematerialized and most of the equity and corporate bonds in the U.S. market are either immobilized or dematerialized. While the U.S. markets have made great strides in achieving immobilization and dematerialization for institutional and broker-to-broker transactions, many industry representatives believe that the small percentage of securities held in certificated form impose unnecessary risk and expense to the industry and to investors. *See* Exchange Act Release No. 8398 (Mar. 11, 2004), 69 FR 12921 (Mar. 18, 2004).

[386] 15 U.S.C. 78q–1(b)(3)(F).

[387] *See* The DTCC (April) Letter at 23–24 (asking the Commission to reformulate Rule 17Ad–22(d)(10) as follows: ''Each clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, *promote the immobilization or dematerialization* of securities certificates and transfer them by book entry to the greatest extent possible when the clearing agency provides central securities depository services.'').

[388] *See* TriOptima Letter at 11.

certificates; but this result is not required by Rule 17Ad–22(d)(10). The Commission also understands that some clearing agencies already have taken steps in furtherance of full dematerialization in the U.S. financial markets and that such efforts are ongoing.[389]

In response to comments about the application of the rule to portfolio compression and collateral management services, the Commission notes that Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

11. Rule 17Ad–22(d)(11): Default Procedures

a. Proposed Rule

Proposed Rule 17Ad–22(d)(11) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to make key aspects of their default procedures publicly available and establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default.

The Commission believes that the rule would provide certainty and predictability to market participants about the measures a clearing agency will take in the event of a participant default because default procedures, among other things, are meant to reduce the likelihood that a default by a participant, or multiple participants, will disrupt the clearing agency's operations. By creating a framework of default procedures that are designed to permit a clearing agency to take actions to contain losses and liquidity pressures it faces while continuing to meet its obligations, the clearing agency should be in a better position to continue providing its services in a manner that promotes accurate clearance and settlement during times of market stress.

The Commission also believes that the requirements in Rule 17Ad–22(d)(11) would increase the possibility that defaults by participants, should they occur, would proceed in an orderly and transparent manner. In particular, the rule would help to ensure that all participants are aware of the default process and are able to plan accordingly and that clearing agencies would have sufficient time to take corrective actions to mitigate potential losses.

b. Comments Received

One commenter urged the Commission to place additional requirements on clearing agencies to conduct and document a test of their default management plans.[390] The commenter stated its belief that default management tests should be undertaken at least on a semi-annual basis.[391]

One commenter responded to a question asked by the Commission in the Proposing Release about how much flexibility clearing agencies should have in the amount of time they are permitted to manage a default and perform a liquidation of positions. The commenter recommended that in the context of security-based swaps the time permitted should be the time necessary for the clearing agency to actually liquidate a security-based swap portfolio rather than establishing a predetermined period by rule.[392] The commenter noted that the time necessary depends on facts and circumstances and is likely to be tied to the characteristics of the security-based swaps involved and the particular markets it in which they trade—as well as the liquidation times derived from the default management plan and practice testing by the clearing agency.[393] The commenter stated that the Commission should have a view of and sign-off authority over the clearing agency's default management plan.[394] The commenter also noted that clearing agencies should continually monitor the risk associated with concentration in participants' positions, and if that concentration could not be liquidated within the time required by the default management plan, the clearing agency should have discretion to include extra charges in initial margin to reflect that risk.[395]

Two commenters argued that proposed Rule 17Ad–22(d)(11) should not apply to entities that perform post-trade processing services such as comparison of data,[396] collateral management and portfolio compression.[397]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(11) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. The Commission believes that the requirements in Rule 17Ad–22(d)(11) increase the possibility that defaults by participants, should they occur, will proceed in an orderly and transparent manner because Rule 17Ad–22(d)(11) helps to ensure that all participants are able to plan for the default process and that clearing agencies will have sufficient time to take corrective action to mitigate potential losses.

As an initial matter, we believe that how frequently a clearing agency conducts default management tests should be determined by each individual clearing agency, in consultation with, and subject to oversight by, the Commission.[398] We agree that it is important for clearing agencies to conduct default management tests, but clearing agencies overseen by the Commission already largely perform these types of exercises as part of their compliance with the requirements of Section 17A of the Exchange Act. Unless additional circumstances clarify that a prescriptive course of action by the Commission is appropriate to bring more standardized scope and frequency to these exercises, we believe that it is appropriate, subject to Commission oversight, to continue to allow clearing agencies discretion to design and perform default management tests that are suited to their particular clearance and settlement activities.

With respect to the commenter who advised the Commission not to establish a particular period in Rule 17Ad–22(d)(11) during which a clearing agency would be required to manage and complete a default liquidation process for security-based swaps, we are not adopting specifically bounded timing requirements in Rule 17Ad–22(d)(11) for a clearing agency to achieve compliance with the rule. Instead, our current belief is that the more general approach we are adopting in Rule 17Ad–22(d)(11) allows clearing agencies to establish, implement, maintain and enforce policies and procedures that comply with Rule 17Ad–22(d)(11) and take into account the particular characteristics of the financial instruments and market dynamics involved in a default at a particular clearing agency. We believe this is the best approach to allow clearing agencies to contain losses and the liquidity pressures that they face while continuing to meet their obligations.

[389] *See* DTCC White Paper, *Strengthening the U.S. Financial Markets: A Proposal to Fully Dematerialize Physical Securities, Eliminating the Costs and Risks They Incur* (July 2012).

[390] *See* ISDA Letter at 5.

[391] *See id.*

[392] *See* ISDA Letter at 6.

[393] *See id.*

[394] *See id.*

[395] *See id.*

[396] *See* Omgeo Letter at 13.

[397] *See* TriOptima Letter at 10.

[398] *See supra* notes 390–391 and accompanying text.

We also agree with commenters who suggested that it is appropriate for clearing agencies to consider concentration risk in margin practices and that if certain concentrations indicate that liquidation of the concentrated positions could not be performed within the parameters of the clearing agency's default management plan, then the clearing agency should consider extra initial margin charges to account for that occurrence.[399] We believe that these issues are appropriately addressed by individual clearing agencies through the submission of proposed rule changes to the Commission for review and public comment.

With regard to suggestions that Rule 17Ad–22(d)(11) categorically should not apply to entities that perform certain post-trade services (*i.e.,* comparison of trade data, collateral management and compression/tear-up services),[400] we note that Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

12. Rule 17Ad–22(d)(12): Timing of Settlement Finality

a. Proposed Rule

Proposed Rule 17Ad–22(d)(12) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure that final settlement occurs no later than the end of the settlement day and that intraday or real-time finality is provided where necessary to reduce risks. The Commission believes that settlement finality should occur not later than the end of the settlement day because it will help to limit the volume of outstanding obligations that are subject to settlement at any one time and thereby reduce the settlement risk exposure of participants and the clearing agency.

b. Comments Received

One commenter that operates several clearing agencies expressed concern that the second clause of proposed Rule 17Ad–22(d)(12), which reads ''and require that intraday or real-time finality be provided where necessary to reduce risks'' could be interpreted to require intraday or real-time settlement finality beyond what its clearing agencies currently provide and are capable of providing without significant systems and process changes.[401] The commenter asked the Commission to clarify that the rule is not intended to impose an obligation on the clearing agencies it operates to provide intraday or real-time finality beyond their current practices or any obligation to build additional capability unless and until there is industry and regulatory consensus on whether and what additional capability to build and how to allocate the cost.[402]

One commenter expressed general support for proposed Rule 17Ad–22(d)(12) but requested that the Commission provide clarification regarding how the rule is compatible with correction of errors and also clarify that ''title transfer'' of initial margin may not occur when it is posted to a clearing agency.[403] Another commenter stated that although it generally supports the proposed requirement to ensure that final settlement occurs no later than the end of the settlement day, it also believes that this requirement must be interpreted reasonably.[404] The commenter asked the Commission to expressly state in the adopting release that circumstances may arise that make same-date settlement impossible, such as natural disasters, terrorist acts, and major communications breakdowns.[405] The commenter added that it currently has the ability to make margin calls on an intraday basis as necessary and its agreements with settlement banks expressly provide when payments in satisfaction of such calls become irrevocable. [406] The commenter asked the Commission to specifically state whether this structure satisfies the requirements of proposed Rule 17Ad–22(d)(12).[407]

One commenter expressed concern that proposed Rule 17Ad–22(d)(12) fails to provide clear standards for real-time trade processing and therefore does not provide a workable framework for trade processing and clearing of security-based swaps.[408] To address its concern, the commenter requested that the Commission adopt rules equivalent to CFTC Rules 37.6(b) and 39.12(B)(7) to require swaps to be immediately confirmed and accepted for clearing upon execution.[409]

Two commenters argued that proposed Rule 17Ad–22(d)(11) should not apply to entities that perform post-trade processing services such as comparison of data,[410] collateral management and portfolio compression,[411] because those services do not involve settlement of transactions.

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(12) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. Rule 17Ad–22(d)(12) does not require a clearing agency that has policies and procedures in place to facilitate final settlement by the end of the settlement day to alter its rules and procedures. As stated in the Proposing Release, ''intraday or real-time finality may be necessary to reduce risk in circumstances where the lack of intraday or real-time finality may impede the clearing agency's ability to facilitate prompt and accurate clearance and settlement, cause the clearing agency's participants to fail to meet their obligations, or cause significant disruptions in the securities markets.'' [412] The Commission agrees with the commenter that a decision to revise the settlement process to implement intraday settlement should involve consultation with all stakeholders.[413] The Commission is not proposing a rule at this time, but plans to study the issue further. Furthermore, the need to correct errors would not be a violation of Rule 17Ad–22(d)(12). We agree that Rule 17Ad–22(d)(12) must be reasonably construed to provide that in extreme circumstances same-date settlement may be impossible to achieve (*i.e.,* due to natural disasters, terrorist acts, and major communications breakdowns).[414] The Commission however notes that the duty of a clearing agency to address these situations is governed by Rule 17Ad–22(d)(4), which requires a clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify sources of operational risk and minimize these risks through the development of appropriate systems, controls, and procedures; implement systems that are reliable, resilient and secure and have adequate scalable

[399] *See supra* note 395 and accompanying text.

[400] *See supra* notes 396–397 and accompanying text.

[401] *See* The DTCC (April) Letter at 25.

[402] *See id.*

[403] *See* ISDA Letter at 7.

[404] *See* The OCC Letter at 15.

[405] *See id.*

[406] *See id.*

[407] *See id.*

[408] *See* SDMA Letter at 6.

[409] *See id.*

[410] *See* Omgeo Letter at 13.

[411] *See* TriOptima Letter at 10.

[412] *See* Proposing Release, *supra* note 35, at 14490.

[413] We note that one clearing agency has made efforts to create a dialogue with the industry on the issue of shortening the settlement cycle. *See* DTCC White Paper, *Proposal to Launch a New Cost-Benefit Analysis on Shortening the Settlement Cycle* (Dec. 2011).

[414] *See supra* note 404 and accompanying text.

capacity; and have business continuity plans that allow for timely recovery of operations and ensure the fulfillment of a clearing agency's obligations.

We agree with commenters that the timing of the effective transfer of initial margin is an important consideration related to achieving settlement finality in an event of default.[415] In general, the validity of the clearing agency's liens and interest in collateral, including initial margin posted by participants, likely could be ascertained by referring to the clearing agency membership agreements, its rules and procedures and Articles 8 and 9 of the Uniform Commercial Code.

With respect to the commenter who said that the rules in 17Ad–22(d)(12): ''Fail to provide clear standards for real time trade processing,'' the Commission does not intend for the rule to provide standards for security-based swaps that are centrally cleared to be confirmed, accepted for clearing and guaranteed by a clearing agency at the point of trade execution.[416] Instead, Rule 17Ad–22(d)(12) focuses on achieving settlement on the particular settlement date associated with the securities transaction or on an intraday or real-time basis (*i.e.,* delivery versus payment) where those additional steps are necessary to reduce risks. The Commission continues to consider the appropriateness of proposing more specific rules that would require transactions to be immediately confirmed and accepted for clearing upon execution.

We agree with commenters that Rule 17Ad–22(d)(12) should not apply if a clearing agency's services do not involve the handling of securities or funds to facilitate settlement of obligations. As discussed above, Rule 17Ad–22 applies only to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

13. Rule 17Ad–22(d)(13): Delivery Versus Payment

a. Proposed Rule

Proposed Rule 17Ad–22(d)(13) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to eliminate principal risk by linking securities transfers to funds transfers to achieve delivery versus payment (''DVP'').

DVP eliminates the risk that a party would lose some or its entire principal because payment is made only if securities are delivered. The Commission believes that clearing agencies should be required to use this payment method to reduce the potential that delivery of the security is not appropriately matched with payment for a security, thereby impeding the clearing agency's ability to facilitate prompt and accurate clearance and settlement.

b. Comments Received

One commenter pointed out that the Commission previously approved an SRO rule change which eliminated the commenter's right to reject matched trades that are reported to it by an exchange even if the purchasing clearing member eventually fails to pay the purchase price of the option.[417] This approach was adopted because of a preference by the clearing agency and its participants to mutualize the risk of such defaults rather than bear the risk that a completed trade would be rejected on the following day because of the default of the counterparty.[418] The commenter asked the Commission to confirm that it would not consider this policy to violate Rule 17Ad–22(d)(13).[419]

Two commenters argued that proposed Rule 17Ad–22(d)(13) should not apply to entities that perform post-trade processing services such as comparison of data,[420] collateral management and tear-up/compression,[421] because those services do not involve settlement of transactions.

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(13) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. As described in the Proposing Release, DVP is achieved in the settlement process when the mechanisms facilitating settlement ensure that delivery occurs if and only if payment occurs.[422] The Commission believes that clearing agencies should be required to link securities transfers to funds transfers in a way that achieves DVP to reduce the potential that delivery of the security is not appropriately matched with payment for a security, thereby impeding the clearing agency's ability to facilitate prompt and accurate clearance and settlement.

The elimination by a clearing agency of its right to reject matched trades and subsequently relying on mutualization of resources to make settlement if necessary does not violate Rule 17Ad–22(d)(13), as mutualization of risk by participants is an acceptable means of eliminating principal risk that would otherwise exist for a clearing agency. The rule requires a clearing agency to establish policies and procedures to link the transfer of securities and funds in a manner that mitigates principal risk in the event of a participant default. The rule does not govern when a clearing agency guarantees a transaction or the clearing agency's loss allocation procedures in the event of a default.

We agree with commenters who suggested that Rule 17Ad–22(d)(13) is not applicable to clearing agencies that do not handle securities or funds to perform settlement. As discussed above, Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

14. Rule 17Ad–22(d)(14): Risk Controls To Address Participants' Failure To Settle

a. Proposed Rule

Proposed Rule 17Ad–22(d)(14) requires clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to institute risk controls, including collateral requirements and limits to cover the clearing agency's credit exposure to each participant exposure fully, that ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle when the clearing agency provides CSD services[423] and extends intraday credit to participants.

The Commission believes it is important for clearing agencies that provide CSD services to institute risk controls, including collateral requirements and limits, to cover the clearing agency's credit exposure to each participant exposure fully, that

[415] *See supra* note 403 and accompanying text.

[416] *See supra* notes 408–409 and accompanying text.

[417] *See* The OCC Letter at 15.

[418] *See id.*

[419] *See id.*

[420] *See* Omgeo Letter at 13.

[421] *See* TriOptima Letter at 10.

[422] *See* Bank for International Settlements, *Delivery Versus Payment in Securities Settlement Systems* (1992), *available at http://www.bis.org/publ/cpss06.pdf.* Three different DVP models can be differentiated according to whether the securities and/or funds transfers are settled on a gross (trade-by-trade) basis or on a net basis.

[423] *See* proposed Rule 17Ad–22(a)(2) for definition of ''central securities depository services.''

ensure timely settlement in these circumstances to address the risk that the participant may fail to settle after credit has been extended. The Commission also believes that requiring the controls to be designed to withstand the inability of the participant with the largest payment obligation to settle, in such circumstances, would reduce the likelihood of disruptions at the clearing agency by having controls in place to account for the largest possible loss from any individual participant and thereby help the clearing agency to provide prompt and accurate clearance and settlement during times of market stress.

b. Comments Received

One commenter asked the Commission to revise Rule 17Ad–22(d)(14) to expressly state that the rule applies to a clearing agency that provides CSD services and extends intraday credit through the operation of a net settlement system.[424] The commenter emphasized that it is important to acknowledge a distinction in the rule between central securities depositories that operate gross settlement systems and those that operate net settlement systems because gross settlement systems amount to a direct intraday extension of credit while a net settlement system places the clearing agency in the position of being a legal agent that extends intraday credits on behalf of other participants that are then settled only at one or more discrete, prescribed times during the process day.[425]

Responding to a question posed by the Commission in the Proposing Release, the same commenter stated its belief that clearing agencies that provide CSD services should not be required to maintain enough financial resources to be able to withstand a settlement failure by the two participant families with the largest settlement obligations to the clearing agency that performs central depository services.[426] The commenter argued that no empirical or historical case has been made to support such a change in how clearing agencies that perform CSD services currently operate their risk management controls.[427]

One commenter stated that the requirements of proposed Rule 17Ad–22(d)(14) should not apply to portfolio compression or collateral management service providers for security-based swaps.[428]

c. Final Rule

We are adopting Rule 17Ad–22(d)(14) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. The Commission believes it is important for clearing agencies that provide CSD services to institute risk controls, including collateral requirements and limits to cover the clearing agency's credit exposure to each participant exposure fully, that ensure timely settlement in these circumstances to address the risk that the participant may fail to settle after credit has been extended. The Commission also believes that requiring the controls that ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle, in such circumstances, reduces the likelihood of disruptions at the clearing agency.

The Commission considered the concerns of commenters who asked the Commission to abstain from any action that would modify Rule 17Ad–22(d)(14) to require a clearing agency that performs CSD services and extends intraday credit to participants to maintain enough financial resources to be able to withstand a settlement failure by the two participant families with the largest settlement obligations to the clearing agency.[429] Rule 17Ad–22(d)(14) does not apply to clearing agencies that provide CCP services.

We understand the request for clarification from some commenters who asked the Commission to revise Rule 17Ad–22(d)(14) to apply solely to a clearing agency that performs CSD services and extends intraday credit to participants through a net settlement system.[430] We agree that the requirements of Rule 17Ad–22(d)(14) apply in full in the context of the operation of a net settlement system. Nevertheless, a clearing agency providing CSD services may choose to organize its operations so that it settles transactions on a trade-for-trade or gross basis and may extend credit in the form of intraday loans or repurchase agreements to facilitate settlement. Accordingly, we are not changing the text of Rule 17Ad–22(d)(14), as suggested, in order to continue to address that situation if it occurs.

We agree with commenters who argued that Rule 17Ad–22(d)(14) does not apply to clearing agencies that do not perform CSD services and do not extend intraday credit to participants.[431] As discussed above, Rule 17Ad–22 only applies to entities that perform CCP or CSD services and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

15. Rule 17Ad–22(d)(15): Physical Delivery Risks

a. Proposed Rule

Proposed Rule 17Ad–22(d)(15) would require clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to disclose to their participants the clearing agency's obligations with respect to physical deliveries.[432]

The Commission believes that such policies and procedures will help to ensure that participants have information that is likely to enhance the participants' understanding of their rights and responsibilities with respect to using the clearance and settlement services of the clearing agency. The Commission also believes that providing such information to participants would promote a shared understanding regarding physical delivery practices between the clearing agency and its participants that could help reduce the potential for fails and thereby facilitate prompt and accurate clearance and settlement.

The rule also would require clearing agencies to reasonably design their operations to identify and manage the risks that arise in connection with their obligations for physical deliveries. The risks associated with physical deliveries could stem from, among other factors, operational limitations with respect to assuring receipt of physical deliveries and processing of physical deliveries.

[424] *See* The DTCC (April) Letter at 25–26 (noting that the standard in RSSS 9, on which Rule 17Ad–22(d)(14) is modeled, specifically identifies central securities depositories that operate net settlement systems).

[425] *See* The DTCC (April) Letter at 26 (suggesting the following language to revise the proposed rule: ''Each clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, institute risk controls, including collateral requirements and limits to cover the clearing agency's credit exposure to each participant family fully, that ensure timely settlement in the event that the participant family with the largest payment obligation is unable to settle when the clearing agency provides central securities depository services and operates a net settlement system or extends intraday credit to participants'').

[426] *See* The DTCC (April) Letter at 26–27.

[427] *See id.*

[428] *See* TriOptima Letter at 10.

[429] *See supra* notes 426–427 and accompanying text.

[430] *See supra* notes 424–425 and accompanying text.

[431] *See supra* note 428 and accompanying text.

[432] The proposed rule would provide clearing agencies with the flexibility to determine the method by which the clearing agency will state this information to its participants. However, the clearing agencies should take care to develop an approach that provides sufficient notice to its participants regarding the clearing agency's obligations.

The Commission believes that requiring clearing agencies to identify and manage these risks would reduce the potential that issues will arise as a result of physical deliveries because the clearing agency will have acted preemptively to deal with potential issues that may disrupt the clearance and settlement process. Accordingly, the Commission believes this requirement would help a clearing agency to facilitate prompt and accurate clearance and settlement consistent with Section 17A of the Exchange Act.[433]

b. Comments Received

One commenter stated that the requirements of proposed Rule 17Ad–22(d)(15) should not apply to portfolio compression or collateral management service providers for security-based swaps.[434]

c. Final Rule

The Commission is adopting Rule 17Ad–22(d)(15) as proposed, except for the clarification discussed in Sections II.B.4 and III.A regarding the application of the rule only to registered clearing agencies. The Commission believes that Rule 17Ad–22(d)(15) helps ensure that participants will have information that enhances their understanding of their rights and responsibilities with respect to using the physical delivery services of a clearing agency which will help reduce the potential for fails. Accordingly, the Commission believes this requirement should help facilitate prompt and accurate clearance and settlement consistent with Section 17A of the Exchange Act.[435]

As discussed above, Rule 17Ad–22 only applies to registered clearing agencies and does not apply to entities exempt from registration as a clearing agency, unless the terms of future exemptions specifically contemplate its application, in whole or in part.

IV. Paperwork Reduction Act

A. Overview and Burden Estimate Comparison to Proposing Release

Certain provisions of the final rules contain new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[436] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission has submitted the information to the Office of Management and Budget (''OMB'') for review. The title of the new collection of information is ''Clearing Agency Standards.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The control number for Rule 17Ad–22 is OMB Control No. 3235–0695.

1. Changes in Estimates

As an initial matter, we note that the PRA burden estimates in this adopting release are significantly lower than the PRA burden estimates in the Proposing Release.[437] Several reasons account for the change. The Proposing Release contained five proposed rules with PRA collection of information requirements in addition to Rule 17Ad–22—proposed Rules 17Aj–1, 17Ad–23, 17Ad–25, 17Ad–26 and 3Cj–1. As described above, these other proposed rules are not being adopted at this time.

Additionally, the Proposing Release estimated that the proposed rules would have applied to seventeen entities. A number of these entities—in particular those providing post-trade processing services for security-based swap transactions—would have been completely unfamiliar with the Commission's registration process for clearing agencies. Further, these entities typically do not have written rule books to govern their relationship with their users. As a result, they would have experienced significant initial burdens associated with the proposed rules.

In contrast, the final rules being adopted today apply only to the seven clearing agencies currently registered with the Commission that provide CCP or CSD services, as discussed above in Section II.B.4.[438] These registered clearing agencies already have written rules, policies and procedures addressing significant aspects of Rule 17Ad–22. For purposes of the PRA analysis, the Commission also estimates that three entities may potentially register with the Commission as clearing agencies acting as CCPs, bringing the total number of respondents to ten—nine of which are CCPs and one of which is a CSD.[439] The Commission believes that some of the entities seeking to register with the Commission as clearing agencies may already be providing similar services in other jurisdictions and therefore may already have written rules and procedures similar to those contemplated by Rule 17Ad–22. Accordingly, the Commission believes that the potential PRA burden on this smaller and more established group of respondents will be significantly lower than the estimates provided in the Proposing Release. Further, the Proposing Release treated each subsection of the rule—and therefore each required policy and procedure—as a separate PRA burden. However, the Commission believes that registered clearing agencies are more likely to be able to address the changes required by Rule 17Ad–22 in an integrated, not piecemeal, review and drafting process. That is, respondents are likely to group aspects of Rule 17Ad–22 together as they implement policies and procedures responsive to Rule 17Ad–22. Therefore, the revised PRA burden estimates no longer account for each requirement as a separate burden.

Finally, the Commission has revised the PRA burden estimates in recognition that many parts of Rule 17Ad–22—specifically Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15)—reflect usual and customary practices of registered clearing agencies. Since registered clearing agencies already comply with significant aspects of Rule 17Ad–22 in the normal course of their activities, many aspects of Rule 17Ad–22 impose minimal PRA burdens on registered clearing agencies limited to the review of the rule and their existing policies and procedures. As discussed below, because certain rules would involve adjustments to a registered clearing agency's rule book and its policies and procedures rather than the creation of entirely separate policies and procedures to support entirely new operations and practices, the Commission recognizes that some aspects of Rule 17Ad–22 will impose incremental new PRA burdens on registered clearing agencies.

Accordingly, the estimated PRA burdens discussed below reflect these updated assessments of the likely PRA burdens.

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[433] 15 U.S.C. 78q–1(b)(3)(F).

[434] *See* TriOptima Letter at 11.

[435] 15 U.S.C. 78q–1(b)(3)(F).

[436] 44 U.S.C. 3501 *et seq.*

[437] *See* Proposing Release, *supra* note 35, at 14521 (''The Commission preliminarily believes that for all respondent clearing agencies the aggregate paperwork burdens contained in proposed Rules 17Ad–22(d)(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (b)(1), (2), (3), (4), (5), (6), (7), (c)(1) and (2) would impose a one-time burden of 83,343 hours and an ongoing annual burden of 39,658 hours.''). In the adopting release, the Commission estimates the total initial burden for Rule 17Ad–22 to be 11,880 hours, with the total ongoing annual burden for Rule 17Ad–22 to be 4,888 hours. *See infra* Section IV.C.7.

[438] The Commission also notes that the Boston Stock Exchange Clearing Corporation (''BSECC'') and Stock Clearing Corporation of Philadelphia (''SCCP'') are currently registered with the Commission as clearing agencies but conduct no clearance or settlement operations. *See* Securities Exchange Act Release Nos. 63629 (Jan. 3, 2011), 76 FR 1473 (Jan. 10, 2011), and 63268 (Nov. 8, 2010), 75 FR 69730 (Nov. 15, 2010), respectively.

[439] The burden estimates include the possibility that either BSECC or SCCP, or both, resume operations in the future.

2. Organization of PRA Review

The discussion of the PRA burdens and costs associated with Rule 17Ad–22 is organized in the following manner:

1. Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15)
2. Rule 17Ad–22(b)(4)
3. Rules 17Ad–22(b)(5)–(7)
4. Rule 17Ad–22(c)
5. Rule 17Ad–22(c)(1)
6. Rule 17Ad–22(c)(2)

Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15) are discussed together because these rules represent usual and customary practices already being implemented by registered clearing agencies. Because Rules 17Ad–22(b)(4), (b)(5)–(7) and (c), respectively establish new minimum practices for registered clearing agencies with regard to model validation, membership practices and certain financial information, the adopting release discusses these rules separately. The burden discussion for Rules 17Ad–22(c)(1) and (2) has been split into sections to account for the different information collection requirements for varying numbers of respondents.

B. Summary of Collection of Information, Use of Information and Comments Received

As noted earlier, the Commission received 25 comment letters concerning the proposed rules.[440] While the Commission received general comments in support of its approach that is both consistent with current global standards[441] and principles-based,[442] thereby making compliance less burdensome for registered clearing agencies, a few commenters discussed the paperwork and compliance burden concerns for some of the rules associated with this adopting release. Some commenters expressed general concerns about the burden of regulation, but such comments focused on rules in the Proposing Release not being adopted today and on areas that go beyond the scope of the adopting release.[443] Commenters expressed concerns about the burdens associated with parts of Rule 17Ad–22(b), and those comments are addressed below. Commenters did not specifically comment on the burdens associated with Rule 17Ad–22(c)–(d).

1. Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15)

The rules in the adopting release contain requirements subject to the PRA. Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15) contain ''collection of information requirements'' within the meaning of the PRA. These rules would require a registered clearing agency to have policies and procedures to adequately document all material aspects of its liquidity risk management processes and its compliance with their requirements. The information collected by virtue of written policies and procedures requirements contained in Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15) generally codify usual and customary practices at CCPs and registered clearing agencies, and thus the PRA burden would be expected to be minimal. Rules 17Ad–22(b)(1)–(3) require written policies and procedures that address risk management practices by CCPs. Specifically, the rules would create standards with respect to: (1) Measurement and management of credit exposures; (2) margin requirements; and (3) financial resources. The Commission did not receive comments on the burdens associated with Rules 17Ad–22(b)(1)–(3).

Rule 17Ad–22(d) sets forth certain minimum standards regarding the operations of registered clearing agencies. The standards established in 17Ad–22(d) address areas including: (1) Transparent and enforceable rules and procedures; (2) participation requirements; (3) custody of assets and investment risk; (4) operational risk; (5) money settlement risk; (6) cost-effectiveness; (7) links; (8) governance; (9) information on services; (10) immobilization and dematerialization of securities certificates; (11) default procedures; (12) timing of settlement finality; (13) delivery versus payment; (14) risk controls to address participants' failures to settle; and (15) physical delivery risks. Commenters did not comment on the burdens associated with Rule 17Ad–22(d).

2. Rule 17Ad–22(b)(4)

Rule 17Ad–22(b)(4) contains ''collection of information requirements'' within the meaning of the PRA. Rule 17Ad–22(b)(4) will require a CCP to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for an annual model validation consisting of evaluating the performance of the clearing agency's margin models and the related parameters and assumptions associated with such models by a qualified person who is free from influence so that he can be candid in his assessment of the model.

One commenter stated that ''a regulatory requirement of model validation on an annual basis is unnecessary (and may be overly burdensome) * * *. [and] can be achieved in a less directive manner.''[444] The commenter did not provide an estimate of the proposed burdens. The commenter suggested that model validation should be conducted on a ''periodic'' basis by a qualified person who ''is sufficiently free from outside influences to perform a candid evaluation.''[445] The commenter did not explain how the suggested alternative requirements would achieve the purposes of the rule with a lesser burden.

The Commission is not persuaded by the position that the frequency of the model validation should be left to the discretion of the CCP.[446] The rule requiring that CCPs have policies and procedures in place for model validation at least annually is appropriate because model performance is not ordinarily expected to vary significantly over short periods but should be reevaluated as market conditions change. Overall, the Commission believes the collection of information related to Rule 17Ad–22(b)(4) is necessary to achieve its purpose, particularly in light of the

[440] *See supra* note 37.

[441] *See* The DTCC (April) Letter at 4 (stating that ''[t]he application of global standards to clearing agencies will also prevent clearing agencies and their participants from incurring unnecessary expense associated with complying with different, and potentially conflicting regulatory standards.''); *see also* The OCC Letter at 3 (encouraging the Commission ''to avoid taking final action on the Proposed Rules prior to receiving greater clarity on what clearinghouse regulations are ultimately adopted by European and U.K. legislators and regulators and what approaches to regulation are ultimately embraced by CPSS/IOSCO. Many potential market participants will be able to choose the jurisdiction in which they conduct their clearing activity, and imposing more prescriptive and costly regulatory burdens on U.S. clearing agencies will have a predictably adverse competitive impact on those clearing agencies.'').

[442] *See* The DTCC (April) Letter at 6 (stating that ''[i]f the Proposed Rules are overly prescriptive, organizations such as DTCC may be subject to conflicting requirements and may be forced to fragment certain enterprise-wide programs in order to comply with such conflicting requirements, which could substantially increase costs and compliance risks within such organizations.''); The OCC Letter at 2 (stating that it ''support[s] the Commission's approach. * * *''); CME Letter at 3 (stating that ''CME Group favors a principles-based approach in these areas, and we urge the Commission not to adopt hard and fast standards that will be costly to implement and maintain and that yield little or no apparent corresponding regulatory benefits.'').

[443] *See, e.g.,* ICE Letter at 1–2 (stating that ''[p]ost-trade processing service providers would be unable to distribute end-of-day settlement prices, as required by the Proposal, and the record keeping requirements of the Proposal would prove so burdensome to such providers that the efficiency and alacrity that they provide to the CDS industry would be adversely affected.'').

[444] *See* The DTCC (April) Letter at 13.

[445] *See* The DTCC (April) Letter at 15.

[446] *See id.*

Congressional mandate under the Dodd-Frank Act.

3. Rules 17Ad–22(b)(5)–(7)

Rules 17Ad–22(b)(5)–(7) contain ''collection of information requirements'' within the meaning of the PRA. The information collection under the written policies and procedures requirements contained in Rules 17Ad–22(b)(5)–(7) would establish requirements regarding access to CCPs.

One commenter expressed that proposed Rules 17Ad–22(b)(5)–(7) providing for mandatory access to CCPs in certain circumstances goes ''beyond anything in current or proposed global standards * * *. [and is, therefore,] unnecessary and counterproductive to the goal of fair and open access within a framework of safe and sound operation.'' [447] But the commenter did not provide an estimate of these burdens. Nor did the commenter suggest alternative requirements that would achieve the purposes of the rule with a lesser burden.

While the Commission understands the concerns raised, the Commission ultimately believes that the benefits of Rules 17Ad–22(b)(5)–(7) are critical to maintaining fairness and open access to central clearing for all market participants, including security-based swaps participants.[448] In this regard, the Commission believes the collection of information related to the rule is necessary to achieve its purpose, particularly in light of the Congressional mandate under the Dodd-Frank Act.

4. Rules 17Ad–22(c)(1)–(2)

Rule 17Ad–22(c)(1)–(2) contains ''collection of information requirements'' within the meaning of the PRA. The information collection under the written policies and procedures requirements contained in Rule 17Ad–22(c) establishes a recordkeeping requirement for CCPs regarding their responsibilities under Rule 17Ad–22(b)(3) and for registered clearing agencies with respect to posting on their respective Web sites annual audited financial statements.

Commenters did not specifically comment on the burdens associated with Rule 17Ad–22(c)(1)–(2).

C. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Standards in Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15) That Impose a PRA Burden

The requirements to develop written policies and procedures in Rules 17Ad–22(b)(1)–(3) and Rules 17Ad–22(d)(1)–(15) impose a PRA burden. The requirements in Rules 17Ad–22(b)(1)–(3) will apply to CCPs that are registered clearing agencies. The Commission estimates that a total of nine CCPs [449] will be subject to the burdens under Rules 17Ad–22(b)(1)–(3). Currently, six clearing agencies are registered to provide CCP services, and the Commission estimates that three more entities could register as clearing agencies to provide CCP services. The requirements in Rules 17Ad–22(d)(1)–(15) (with the exception of Rules 17Ad–22(d)(10) and (13)–(15), which are applicable only to CSDs), on the other hand, apply to all registered clearing agencies, of which there could potentially be a total of ten entities, including the one registered clearing agency that is a CSD.

As noted above, registered clearing agencies already have written policies and procedures that meet the standards set forth in Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15) as part of their usual and customary business practice. Accordingly, the Commission believes that the registered clearing agencies would not need to build new infrastructure or modify operations to continue to meet Rule 17Ad–22(b)(1)–(3) and (d)(1)–(15). The Commission believes that registered clearing agencies will incur the incremental burdens of reviewing existing policies and procedures for compliance and updating existing policies and procedures where appropriate. The requirements would impose an aggregate one-time burden of approximately 1,750 hours for all registered clearing agencies.[450] The standards contained in Rule 17Ad–22(d) would also impose ongoing burdens on registered clearing agencies. For example, Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15) would require registered clearing agencies to perform certain ongoing monitoring and enforcement activities with respect to the written policies and procedures the registered clearing agency creates in response to the standard. Accordingly, the Commission believes that those ongoing activities would impose an aggregate annual burden of approximately 600 hours for all respondent clearing agencies.[451] Because recent assessments of the registered U.S. clearing agencies support the conclusion that clearing agencies and their rule books generally meet or exceed analogous standards of operation and governance to those standards within Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15),[452] the Commission believes that the burden estimate for the aggregate one-time burden should be revised down from the burden estimated in the Proposing Release. The Commission estimates that because these initial compliance efforts will largely comprise a review of existing policies and procedures, the aggregate one-time burden on respondent clearing agencies will be incremental to their current compliance processes. The expected review of current policies and procedures will likely not involve much involvement by the information technology staff at the clearing agency or much involvement by the clearing agency's assistant general counsel because the requirements of these rules have already been written into and have been implemented as part of the policies and procedures of registered clearing agencies. Accordingly, those burden estimates have been reduced and the burden estimate for the compliance attorney, who will most likely perform most of the review of current policies and procedures, has been increased. In order to estimate the one-time burden and annual burden for ongoing activities, we looked to the burdens imposed by similar policies and procedures requirements in Regulation NMS as a guide and adapted those figures for the purposes of this release.[453]

[447] *See* The DTCC (April) Letter at 5; *see also* The DTCC (April) Letter at 4 (stating that ''[t]he application of global standards to clearing agencies will also prevent clearing agencies and their participants from incurring unnecessary expense associated with complying with different, and potentially conflicting regulatory standards.'').

[448] *See supra* Section III.D.1.

[449] The Commission believes that there is a potential for new security-based swap clearing agencies to form but does not expect there to be a large number based on the significant level of capital and other financial resources needed for the formation of a clearing agency.

[450] This figure was calculated as follows: ((Assistant General Counsel at 60 hours) + (Compliance Attorney at 85 hours) + (Computer Operations Manager at 15 hours) + (Senior Business Analyst at 15 hours)) = 175 hours × 10 respondent clearing agencies = 1,750 hours.

[451] This figure was calculated as follows: Compliance Attorney at 60 hours × 10 respondent clearing agencies = 600 hours.

For each respondent clearing agency, the estimated annualized burden for Rules 17Ad–22(b)(1)—(3) and (d)(1)—(15) is 98 hours (figure calculated as follows: 175 hours (Year 1 burden) + 60 hours (Year 2 burden) + 60 hours (Year 3 burden) = 295 hours (estimated total burden over 3 years) ÷ 3 years = 98 hours).

[452] *See* Proposing Release, *supra* note 35, at 14509.

[453] *See* Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (discussing in Section VIII.A.4 the time needed from legal, compliance, information technology and business operations personnel to create policies and procedures for preventing and monitoring trade-throughs).

2. Standards in Rule 17Ad–22(b)(4) That Impose a PRA Burden

The requirement to develop written policies and procedures in Rule 17Ad–22(b)(4) imposes a PRA burden. The requirement in Rule 17Ad–22(b)(4) will apply to all CCPs. As discussed above, the Commission estimates that nine CCPs will be subject to the burdens under Rule 17Ad–22(b)(4).

Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission has preserved the burden estimates from the Proposing Release. The Commission estimates that Rule 17Ad–22(b)(4) would impose a one-time burden on each respondent CCP of 210 hours, corresponding to an aggregate one-time burden on all respondent CCPs of 1,890 hours.[454]

Rule 17Ad–22(b)(4) would require one-time systems adjustments related to the capability to perform an annual model validation. These adjustments would amount to an aggregate one-time burden of approximately 900 hours.[455]

CCPs would be required to collect information relating to their model validation standards required by Rule 17Ad–22(b)(4) on an ongoing basis. The Commission expects that the exact burden of administering the procedures for model validation standards would vary depending on how frequently each CCP may need to update its procedures. Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission estimates that the ongoing requirements of this rule would impose an annual burden of 60 hours on each respondent CCP, corresponding to an aggregate annual burden for all respondent CCPs of 540 hours.[456]

Based on its oversight of clearing agencies, the Commission estimates that Rule 17Ad–22(b)(4) would impose an annual cost on all respondent CCPs for work on model validation. The Commission believes clearing agencies would hire a consulting firm that dedicates two consultants to the project. Consistent with the Proposing Release,[457] the Commission estimates that should respondent CCPs decide to hire external consultants to develop and implement Rule 17Ad–22(b)(4) through written policies and procedures, the ongoing cost associated with hiring such consultants would be approximately $3.9 million per year.[458]

3. Standards in Rules 17Ad–22(b)(5)–(7) That Impose a PRA Burden

The requirements to develop written policies and procedures in Rules 17Ad–22(b)(5)–(7) impose a PRA burden. These PRA burdens will apply to all CCPs. As discussed above, the Commission estimates that nine CCPs will be subject to the burdens under Rules 17Ad–22(b)(5)–(7). The Commission believes that CCPs are more likely to be able to address the changes required by Rules 17Ad–22(b)(5)–(7) in an integrated, not piecemeal, review and drafting process to implement policies and procedures responsive to these rules. Therefore, the revised PRA burden estimates no longer account for each requirement as a separate burden.

Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission has preserved the burden estimates from the Proposing Release. The Commission estimates that Rules 17Ad–22(b)(5)–(7) would impose a one-time burden on each respondent CCP of 210 hours, corresponding to an aggregate one-time burden on all respondent CCPs of 1,890 hours.[459]

CCPs would be required to collect information relating to standards of Rules 17Ad–22(b)(5)–(7) on an ongoing basis. Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission estimates that the ongoing requirements of this rule would impose an annual burden of 60 hours on each respondent CCP, corresponding to an aggregate annual burden for all respondent CCPs of 540 hours.[460]

4. Standards in Rule 17Ad–22(c) That Impose a PRA Burden

The standards in Rule 17Ad–22(c) impose a PRA burden.[461] The requirements of Rule 17Ad–22(c) will apply to all registered clearing agencies. Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission has preserved the burden estimates from the Proposing Release. In contrast to the Proposing Release's burden estimates for proposed Rule 17Ad–22(c)(2), which accounted for 17 clearing agencies, the burden estimate in the adopting release for Rule 17Ad–22(c) reflects a smaller number of clearing agencies. The Commission estimates that Rule 17Ad–22(c) would impose a one-time burden on each respondent clearing agency of 191 hours, corresponding to an aggregate one-time burden on all respondent clearing agencies of 1,910 hours.[462]

The Commission believes the one-time burden imposed would involve adjustments needed to synthesize and format existing information in a manner sufficient to explain the methodology the clearing agency uses to meet the requirement of Rule 17Ad–22(c). The Commission believes these adjustments would impose a one-time burden of 100 hours on each clearing agency, corresponding to an aggregate one-time

[454] This figure was calculated as follows: ((Assistant General Counsel at 87 hours) + (Compliance Attorney at 77 hours) + (Computer Operations Manager at 23 hours) + (Senior Business Analyst at 23 hours)) = 210 hours × 9 respondent CCPs = 1,890 hours.

[455] This figure was calculated as follows: ((Chief Compliance Officer for 40 hours) + (Computer Department Operations Manager for 40 hours) + (Senior Programmer for 20 hours)) = 100 hours × 9 respondent CCPs = 900 hours.

[456] This figure was calculated as follows: Compliance Attorney at 60 hours × 9 respondent CCPs = 540 hours for all respondent CCPs.

For each respondent CCP, the estimated annualized burden for Rule 17Ad–22(b)(4) is 143 hours (figure calculated as follows: 210 hours + 100 hours (Year 1 burden) + 60 hours (Year 2 burden) + 60 hours (Year 3 burden) = 430 hours (estimated total burden over 3 years) ÷ 3 years = 143 hours).

[457] *See* Proposing Release, *supra* note 35, at 14529.

[458] This figure was calculated as follows: 2 Consultants for 30 hours per week at $600 per hour = $36,000 per week × 12 weeks = $432,000 per clearing agency × 9 respondent CCPs = $3,888,000. The $600 per hour figure for a consultant was calculated using *www.payscale.com,* modified by Commission staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[459] This figure was calculated as follows: ((Assistant General Counsel at 87 hours) + (Compliance Attorney at 77 hours) + (Computer Operations Manager at 23 hours) + (Senior Business Analyst at 23 hours)) = 210 hours × 9 respondent CCPs = 1,890 hours.

[460] This figure was calculated as follows: Compliance Attorney at 60 hours × 9 respondent CCPs = 540 hours for all respondent CCPs.

For each respondent CCP, the estimated annualized burden for Rules 17Ad–22(b)(5)–(7) is 110 hours (figure calculated as follows: 210 hours (Year 1 burden) + 60 hours (Year 2 burden) + 60 hours (Year 3 burden) = 330 hours (estimated total burden over 3 years) ÷ 3 years = 110 hours).

[461] The burden discussion for the different information collection requirements of Rule 17Ad–22(c)(1)–(2) has been split into sections to account for the different requirements for varying numbers of respondents. Rule 17Ad–22(c) imposes an overall burden relating to policies and procedures and system adjustments on all registered clearing agencies, while Rule 17Ad–22(c)(1), as discussed below, imposes on CCPs an ongoing burden to generate the required reports concerning their financial resources and Rule 17Ad–22(c)(2), as discussed below, imposes initial and ongoing burdens related to annual audited financial statements to all registered clearing agencies, some of which are already implementing this requirement as part of their usual and customary practices.

[462] This figure was calculated as follows: ((Assistant General Counsel at 60 hours) + (Compliance Attorney at 85 hours) + (Computer Operations Manager at 23 hours) + (Senior Business Analyst at 23 hours)) = 191 hours × 10 respondent clearing agencies = 1,910 hours.

burden imposed on all clearing agencies of 1,000 hours.[463]

Clearing agencies would be required to collect information relating to standards of Rule 17Ad–22(c) on an ongoing basis. Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission estimates that the ongoing requirements of this rule would impose an annual burden of 60 hours on each respondent clearing agency, corresponding to an aggregate annual burden for all respondent clearing agencies of 600 hours.[464]

5. Standards in Rule 17Ad–22(c)(1) That Impose a PRA Burden

The standards in Rule 17Ad–22(c)(1) impose a PRA burden. In contrast to the Proposing Release's burden estimates for proposed Rule 17Ad–22(c)(2), which accounted for 17 clearing agencies, the burden estimate in the adopting release for Rule 17Ad–22(c)(1) reflects a smaller number of clearing agencies. The requirements of Rule 17Ad–22(c)(1) will apply to nine CCPs.

On an ongoing basis, the Commission estimates that for a CCP to generate the required reports concerning its financial resources would impose a burden of three hours per respondent CCP per quarter. This amounts to an annual burden of 12 hours for each CCP and corresponds to an aggregate annual burden of 108 hours for all respondent CCP. [465]

6. Standards in Rule 17Ad–22(c)(2) That Impose a PRA Burden

The standards in Rule 17Ad–22(c)(2) impose a PRA burden. In contrast to the Proposing Release's burden estimates for proposed Rule 17Ad–22(c)(2), which accounted for 17 clearing agencies, the burden estimate in the adopting release for Rule 17Ad–22(c)(2) reflects a smaller number of clearing agencies. The requirements of Rule 17Ad–22(c)(2) will apply to all registered clearing agencies, a total of ten respondents.

The Commission expects that the exact burden of collecting information relating to the procedures for facilitating an annual audited financial statement of the clearing agency and posting that annual audited financial statement to the clearing agency's Web site would vary depending on how frequently each clearing agency may need to update its procedures. Also, the Commission estimates based on its experience with entities of similar size to the respondents to this collection, that the initial burden of generating annual audited financial statements would generally require on average 500 hours per respondent clearing agency.[466] However, as most registered clearing agencies are already implementing this requirement as part of their usual and customary practices, the rule, as an initial burden, would largely affect a total of four entities—three potential new entrants and one clearing agency that currently does not have two years of annual audited financial statements prepared in accordance with U.S. GAAP or IFRS posted on its Web site and therefore, would be required to incur the costs of paying for an independent audit for two years of financial statements.[467] The Commission estimates that Rule 17Ad–22(c)(2) would impose a one-time burden on each of these four clearing agencies of 500 hours to prepare and review internal financial statements, corresponding to an aggregate one-time burden on the four respondent clearing agencies of 2,000 hours.[468] This requirement would necessitate work hours of compliance personnel and finance personnel at the clearing agency to compile relevant data, organize and analyze that data, and then post it to the clearing agency's Web site consistent with the rule.

Clearing agencies also would be required to collect information relating to any procedures used to support compliance with Rule 17Ad–22(c)(2) on an ongoing basis. Based on the analogous policies and procedures requirements and the corresponding burden estimates in Regulation NMS, the Commission estimates that the ongoing requirements of this rule would impose an annual burden of 250 hours on each respondent clearing agency for collecting information relating to administering policies and procedures for facilitating an annual audited financial statement of the clearing agency and posting that annual audited financial statement to the clearing agency's Web site for an aggregate burden of 2,500 hours.[469]

The requirement also would require the services of a registered public accounting firm. The Commission estimates those services would on average cost approximately $500,000 annually.[470] Therefore, to meet the ongoing requirements of Rule 17Ad–22(c)(2) the Commission estimates a total annual cost of approximately $5,000,000 in the aggregate for all respondent clearing agencies.[471]

7. Total Burden for Rule 17Ad–22

The total initial burden for Rule 17Ad–22 is 11,340 hours.[472] The total ongoing annual burden for Rule 17Ad–22 is 4,888 hours.[473] The ongoing

[463] This figure was calculated as follows: ((Chief Compliance Officer at 40 hours) + (Computer Operations Department Manager at 40 hours) + (Senior Programmer at 20 hours)) = 100 hours × 10 respondent clearing agencies = 1,000 hours.

[464] This figure was calculated as follows: Compliance Attorney at 60 hours × 10 respondent clearing agencies = 600 hours for all respondent clearing agencies.

For each respondent clearing agency, the estimated annualized burden for Rule 17Ad–22(c) is 137 hours (figure calculated as follows: 191 hours + 100 hours (Year 1 burden) + 60 hours (Year 2 burden) + 60 hours (Year 3 burden) = 411 hours (estimated total burden over 3 years) ÷ 3 years = 137 hours).

[465] This figure was calculated as follows: ((Compliance Attorney at 1 hour) + (Computer Operations Department Manager at 2 hours)) = 3 hours per quarter × 4 quarters per year = 12 hours per year × 9 respondent clearing CCPs = 108 hours.

For each respondent CCP, the estimated annualized burden for Rule 17Ad–22(c)(1) is 8 hours (figure calculated as follows: 0 hours (Year 1 burden) + 12 hours (Year 2 burden) + 12 hours (Year 3 burden) = 24 hours (estimated total burden over 3 years) ÷ 3 years = 8 hours).

[466] An example of the Commission's experience with entities of a similar size to the respondents is that the Commission required entities to post their annual financial statements on their respective Web sites as conditions to the Commission's authorizing them to provide CCP services for credit default swaps. *See supra* note 2.

[467] BSECC and SCCP currently do not post audited financial statements on their Web sites and are considered new entrants.

[468] This figure was calculated as follows: Senior Accountant at 500 hours × 4 respondent clearing agencies = 2,000 hours.

[469] This figure was calculated as follows: Senior Accountant at 250 hours × 10 respondent clearing agencies = 2,500 hours.

Annualized, the estimated burden for Rule 17Ad–22(c)(2) is 333 hours (figure calculated as follows: 500 hours (Year 1 burden) + 250 hours (Year 2 burden) + 250 hours (Year 3 burden) = 1,000 hours (estimated total burden over 3 years) ÷ 3 years = 333 hours). This figure represents a weighted average for 10 respondent clearing agencies. The burden will be higher for clearing agencies that have not yet implemented Rule 17Ad–22(c)(2). The burden will be less for clearing agencies that have already implemented the requirement as part of their usual and customary practices.

[470] A precise estimate of audit costs for clearing agencies cannot be made, and therefore, we examined a number of existing surveys, (*see, e.g.,* surveys by CFO.com studying large and small public companies). While the costs may vary depending on the circumstances, we are using an estimate of $500,000, which is on the upper range for an average cost.

[471] This figure was calculated as follows: $500,000 estimated cost of registered public accounting firm × 10 respondent clearing agencies = $5,000,000.

[472] This figure was calculated as follows: 1,750 hours for initial burdens associated with 17Ad–22(b)(1)–(3) and (d)(1)–(15) + 2,790 hours for initial burdens associated with 17Ad–22(b)(4) + 1,890 hours for initial burdens associated with 17Ad–22(b)(5)–(7) + 4,910 hours for initial burdens associated with 17Ad–22(c) = 11,340 hours.

[473] This figure was calculated as follows: 600 hours for annual burdens associated with 17Ad–22(b)(1)–(3) and (d)(1)–(15) + 540 hours for annual burdens associated with 17Ad–22(b)(4) + 540 hours for initial burdens associated with 17Ad–22(b)(5)–(7) + 3,208 hours for annual burdens associated with 17Ad–22(c) = 4,888 hours.

external cost for Rule 17Ad–22 is $8.9 million.[474]

D. Collection of Information Is Mandatory

The collection of information relating to Rule 17Ad–22(b) and Rule 17Ad–22(c)(1) will be mandatory for all CCPs. The collection of information relating to Rule 17Ad–22(c)(2) and Rule 17Ad–22(d) will be mandatory for all registered clearing agencies.

E. Confidentiality

The Commission expects that the written policies and procedures that will be generated pursuant to Rules 17Ad–22(b)(1)–(7), Rule 17Ad–22(c)(2), and Rules 17Ad–22(d)(1)–(15) will be communicated to the members, subscribers, and employees (as applicable) of all entities covered by the Rule. To the extent that this information is made available to the Commission, it will not be kept confidential. Any records generated in connection with the requirement of Rules 17Ad–22(b)(1)–(3), Rules 17Ad–22(b)(5)–(7), Rule 17Ad–22(c)(2), and Rules 17Ad–22(d)(1)–(15) to establish written policies and procedures will be required to be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a–1 [475] and 17a–4(e)(7).[476]

The information collected pursuant to Rule 17Ad–22(c)(1) relating to the calculation and maintenance of a record of the financial resources necessary to meet the requirements of Rule 17Ad–22(b)(3) will be retained by the registered clearing agencies that perform CCP services and will be available to the Commission. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.[477]

V. Economic Analysis

A. Overview

The rules that we are adopting today are designed to enhance the substantive regulation of securities clearing agencies. The Commission is sensitive to the economic effects of the rules it is adopting today, including their costs and benefits. Some of these costs and benefits stem from statutory mandates, while others are affected by the discretion we exercise in implementing the mandates. We requested comment on all aspects of the costs and benefits of the proposal, including any effect our proposed rules may have on efficiency, competition, and capital formation.

As required by Title VII and Title VIII of the Dodd Frank Act, Rule 17Ad–22 will establish a regulatory framework for CCPs for security-based swap transactions and clearing agencies that are designated as systemically important by the Council. In so doing, Rule 17Ad–22 will help ensure that clearing agencies maintain effective operational and risk management procedures as well as meet the statutory requirements under the Exchange Act on an ongoing basis. Rule 17Ad–22 is consistent with the Dodd-Frank Act and the Congressional findings in the adoption of Section 17A. Specifically, Congress found that:

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.[478]

Section 17A of the Exchange Act was adopted in direct response to the paperwork crisis of the late 1960's that nearly brought the securities industry to a standstill and directly or indirectly resulted in the failure of large numbers of broker-dealers [479] because the industry's clearance and settlement procedures were inefficient and lacked automation.

Economic characteristics of FMIs,[480] such as clearing agencies, including economies of scale, barriers to entry, and the particulars of their legal mandates may limit competition and confer market power on FMIs, which could lead to lower levels of service, higher prices, or under-investment in risk-management systems.[481] In addition, the institutional structure of entities that provide clearance and settlement services may not provide strong incentives or mechanisms for safe and efficient design and operation, fair and open access, or the protection of participant and customer assets in some circumstances.[482] Moreover, the participants in a clearing agency may not consider the full impact of their actions on other participants, such as the potential costs of delaying payments or settlements.[483] Overall, a clearing agency and its participants may generate significant negative externalities for the entire securities market if they do not adequately manage their risks.[484]

While the Commission believes that the U.S. clearance and settlement system currently works well, it is important that the operations of clearing agencies evolve with the securities markets, especially as clearing agencies affect a wider array of market participants. A clearing agency's direct participants, such as broker-dealers, banks and other types of financial intermediaries, use clearing agencies to clear and settle proprietary trading activity. They also use clearing agencies as intermediaries for institutional investors, retail investors, and proprietary trading firms,[485] because clearing and settling a high volume of financial transactions multilaterally through a clearing agency may in many

[474] This figure was calculated as follows: $3,888,000 (for Rule 17Ad–22(b)(4)) + $5,000,000 (for Rule 17Ad–22(c)(2)).

[475] 17 CFR 240.17a–1.

[476] 17 CFR 240.17a–4(e)(7).

[477] *See, e.g.,* 5 U.S.C. 552 (Exemption 4 of the Freedom of Information Act provides an exemption for ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are ''contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.'' 5 U.S.C. 552(b)(8)).

[478] *See* 15 U.S.C. 78q–1(a)(1).

[479] This crisis resulted from sharply increased trading volumes and historic industry inattention to securities processing, as demonstrated by inefficient, duplicative and highly manual clearance and settlement system, poor records, insufficient controls over funds and securities, and use of untrained personnel to perform processing functions. *See, e.g.,* Securities and Exchange Commission, Study of Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. No. 231, 92d Cong., 1st Sess. 13 (1971).

[480] A ''financial market infrastructure'' is a multilateral system among participating institutions, including the operator of the system, used for the purposes of clearing, settling, or recording payments, securities, derivatives, or other financial transactions. *See id.* at 7.

[481] *See FMI Report, supra* note 32, at 11.

[482] *See id.*

[483] *See id.*

[484] *See id.*

[485] Some clearing agencies permit proprietary trading firms, including high-frequency traders, that meet the clearing agency's participation requirements, to clear trades without intermediation by a broker-dealer or futures commission merchant (''FCM'').

cases allow for greater efficiency and lower costs than settling bilaterally.[486] In addition, clearing agencies are often able to manage risks related to the clearing and settling of financial transactions more effectively for their participants, and, in some cases, reduce certain risks, such as the risk that a purchaser of a security will not receive the security or the risk that a seller of a security will not receive payment for the security.[487]

Because clearing agencies concentrate risk, a disruption in a clearing agency's operations or the failure of a clearing agency to meet its obligations could cause a systemic disruption that can be costly for more than just the clearing agency and its members. For example, a significant dollar value of financial transactions pending for clearance or to be cleared in the future through the clearing agency could fail to settle on time or at the original contract terms. If the clearing agency acting as a CCP does not have the funds to cover the fail, members of the clearing agency would suffer losses and liquidity constraints due to their inability to access their clearing fund contributions and the clearing agency's inability to honor its obligations.[488] In addition, the failure has the potential to harm the market as a whole in all financial instruments cleared by that clearing agency and its members, beyond the securities pending for clearance at the time of the original settlement failure.

The standards adopted today as part of Rule 17Ad–22 are intended to help mitigate these risks by requiring measures that would reinforce the safety of clearing agencies. Safe and reliable clearing agencies are essential not only to the stability of the securities markets they serve but often also to payment systems, which may be used by a clearing agency or may themselves use a clearing agency to transfer collateral. The safety of securities settlement arrangements and post-trade custody arrangements is also critical to the goal of protecting the assets of investors from claims by creditors of intermediaries and other entities that perform various functions in the operation of the clearing agency. Investors are more likely to participate in markets when they have confidence in the safety and reliability of clearing agencies; therefore the rule being adopted today should promote capital formation.

In addition, the rule seeks to promote the efficiency of clearing agencies. As described below, the structure of the clearing agency market and the structure of the clearing agencies themselves may not provide the competitive incentives necessary to promote transparency, fair access, and efficient operations. Transparency helps to ensure that clearing members can make more informed decisions and that market participants in general have better information about the stability of the system. In turn, transparency promotes competition by facilitating comparisons across clearing agencies. Fair access ensures that a variety of market participants can gain access to clearing and settlement services and thus promotes competition by lowering barriers to entry for clearing agency participants.[489] Efficient operations can result in higher quality services or lower fees (or both) to clearing agency members and their customers.

The analysis below examines the projected economic effects of the adopted rules. The analysis starts with a baseline discussion of the current regulatory landscape and existing industry practices of clearing agencies relating to their operations and risk management procedures and membership policies. This discussion provides a point of comparison for the second half of the economic analysis, which is a discussion of the benefits and costs of the rules, as well as alternative approaches to the rules that were considered by the Commission.[490]

B. Baseline

Rule 17Ad–22 impacts the market for clearing agency services in securities, with an emphasis on CCP services. There are currently seven clearing agencies registered with the Commission that provide CCP or CSD services. Six of these clearing agencies offer CCP services, and one is a CSD. Together, they processed over $1 quadrillion in financial market transactions in 2011.[491] Some of these clearing agencies also are regulated by the CFTC, the Federal Reserve, and the New York State Department of Banking.

Central clearing facilitates the management of counterparty credit risk among dealers and other institutions by shifting that risk from individual counterparties to CCPs, thereby helping protect counterparties from each other's potential failures and preventing the buildup of risk in such entities, which could be systemically important. Central clearing generally reduces the counterparty risk of market participants, including market makers and dealers. If market makers and dealers cannot diversify this counterparty risk, they generally pass the costs on to their clients in the form of higher transaction costs. In order for central clearing to reduce risk, mark-to-market pricing and margin requirements need to be applied in a consistent manner.[492] CCPs generally use liquid margin collateral to manage the risk of a CCP member's failure, and rely on the accuracy of their margin calculations and their access to liquid collateral to protect against sudden movements in market prices. A CCP can also reduce systemic risk through netting, by reducing the amount of funds or other assets that must be exchanged at settlement.[493] Nevertheless, a CCP also concentrates risks and responsibility for risk

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[486] *See Risk Management Supervision of Designated Clearing Entities* (July 2011), Report by the Commission, Board and CFTC to the Senate Committees on Banking, Housing, and Urban Affairs and Agriculture in fulfillment of Section 813 of Title VIII of the Dodd-Frank Act.

[487] *See id.*

[488] *See id.* at 8. While no clearing agency has ever failed in the United States, such failure is not impossible. *See, e.g.,* Donald MacKenzie, *An Engine, Not A Camera: How Financial Models Shape Markets* (2009); Ian Hay Davison, *Securities Review Committee Report* (1989) (discussing the events surrounding the failure of the Hong Kong Futures Exchange Clearing Corporation in 1987).

[489] *See infra* discussion of Rules 17Ad–22(b)(5), (6) and (7) in Section V.C.5.

[490] In discussing the current practices of the registered clearing agencies below, we have omitted descriptions of the variations in the practices, policies, and procedures among registered clearing agencies that are, nevertheless, consistent with the requirements of the final rules. However, while these variations are not discussed, notable distinctions in practices, policies, and procedures that significantly impact the economic analysis are addressed, as applicable.

[491] This figure was calculated from the following sources: DTCC 2011 Annual Report, *available at http://dtcc.com/about/annuals/2011/report.php;* OCC 2011 Annual Report, *available at http://www.optionsclearing.com/components/docs/about/annual-reports/occ_2011_annual_report.pdf;* CME Group 2011 Annual Report, *available at http://cmegroup.com/investor-relations/annual-review/2011/downloads/CME_Group_2011_Annual_Report.pdf;* InterContinental Exchange 2011 Annual Report, *available at http://files.shareholder.com/downloads/ICE/1860307941x0x556734/44EA48C5-CBCB-4468-BF54-048BFEEC8264/ICE_2011AR.pdf.*

[492] *See* Christopher Culp, *OTC-Cleared Derivatives: Benefits, Costs, and Implications of the ''Dodd-Frank Wall Street Reform and Consumer Protection Act* (Journal of Applied Finance, No. 2, 2010), *available at http://www.rmcsinc.com/articles/OTCCleared.pdf.*

[493] *See, e.g.,* Darrell Duffie and Haoxiang Zhu, *Does a Central Clearing Counterparty Reduce Counterparty Risk?,* (Stanford University, Working Paper, 2010), *available at http://www.stanford.edu/~duffie/DuffieZhu.pdf;* Nout Wellink, *Mitigating System Risk in OTC Derivatives Markets,* (Banque de France, Financial Stability Review, No. 14—Derivatives—Financial innovation and stability, July 2010), *available at http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/etude15_rsf_1007.pdf;* and Manmohan Singh, *Collateral, Netting and System Risk in the OTC Derivatives Market,''* (International Monetary Fund, Working Paper, 2009), *available at http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf.*

management in the CCP.[494] Consequently the effectiveness of a CCP's risk controls and the adequacy of its financial resources are critical aspects of the infrastructure of the market it serves.[495]

The market for CCP services in the United States tends to be segmented by financial instrument, with clearing agencies often specializing in particular instruments. As such, some market segments may have characteristics of natural monopolies capable of being sustained despite the presence of competitors with the potential to enter the market segment in question.[496] For example, in the United States, following a period of consolidation facilitated by the introduction of Section 17A of the Exchange Act, only one CCP currently processes transactions in U.S.-listed equities and only one CCP processes transactions in exchange-traded options. However, three clearing agencies currently serve as CCPs for swaps and security-based swaps. Although two of the CCPs for security-based swaps are affiliated entities, these affiliated CCPs do not compete with each other; one primarily serves the U.S. market for security-based swaps, and the other primarily serves the European market. Further, the affiliated CCP serving the U.S. market has a dominant market share in the United States, though the Commission believes this may be subject to change over time as a result of competition from the other registered CCPs offering security-based swap services, the entry of new competitors into the U.S. market or other factors.

The following sections set the baseline for comparison in our analysis of the economic effects. In particular, they describe the legal framework under which registered clearing agencies operate and the current practices of clearing agencies as they relate to the rules being adopted today.

1. Legal Framework

a. Overview of Statutory Framework and the Dodd-Frank Act

In recognition of the risks posed by the concentration of clearance and settlement activity at clearing agencies, the Exchange Act and Titles VII and VIII of the Dodd-Frank Act provide a framework for enhanced regulation and supervision of clearing agencies by the Commission.

i. Exchange Act

Section 17A of the Exchange Act[497] and Rule 17Ab2–1[498] require entities to register with the Commission prior to performing the functions of a clearing agency. Under the statute, the Commission is not permitted to grant registration unless it determines that the rules and operations of the clearing agency meet the standards set forth in Section 17A.[499] If the Commission registers a clearing agency, the Commission oversees the clearing agency to facilitate compliance with the Exchange Act using various tools that include, among other things, the rule filing process for SROs and on-site examinations by Commission staff. Section 17A(d) also gives the Commission authority to adopt rules for clearing agencies as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act and prohibits a registered clearing agency from engaging in any activity in contravention of these rules and regulations.[500] In 1980, the staff of the Commission provided guidance on meeting the requirements of Section 17A in its *Standards for Clearing Agency Regulation*.[501]

ii. Title VII of the Dodd-Frank Act

As described in Section I above, the Dodd-Frank Act was enacted to, among other things, mitigate systemic risk and promote the financial stability of the United States by improving accountability and transparency in the financial system and by providing for enhanced regulation and oversight of institutions designated as systemically important.[502] Specifically, Title VII of the Dodd-Frank Act amended the Exchange Act to require that security-based swap transactions must be cleared through a clearing agency that is registered with the Commission (or exempt from registration) if they are of a type that the Commission determines be cleared, unless an exemption from mandatory clearing applies.[503] New Section 17A(i) of the Exchange Act also gives the Commission authority to promulgate rules that establish standards for security-based swap clearing agencies.[504] Compliance with any such rules is a prerequisite to the registration of a clearing agency with the Commission[505] and is also a condition to the maintenance of its continued registration.[506]

iii. Title VIII of the Dodd-Frank Act

In addition to the provisions in Title VII that expand the Commission's authority under the Exchange Act to include security-based swap activities, Title VIII of the Dodd-Frank Act, entitled the Clearing Supervision Act, establishes an enhanced supervisory and risk control system for systemically important clearing agencies and other FMUs.[507] As previously noted, on July 18, 2012, the Council designated DTC, FICC, NSCC and OCC as systemically important, and Section 17A(i) of the Exchange Act provides that the Commission, in establishing clearing agency standards and in its oversight of clearing agencies, may conform such standards and such oversight to reflect evolving international standards.[508] Section 805(a) of the Clearing Supervision Act supplements the Exchange Act requirements by mandating the Commission to take into consideration relevant international standards and existing prudential requirements for clearing agencies that are designated as systemically important FMUs.[509]

In part, the Clearing Supervision Act provides that the Commission, considering relevant international standards and existing prudential requirements, may prescribe regulations that set risk management standards for the operations related to PCS Activities[510] of a Designated Clearing Entity or the conduct of designated activities by a Financial Institution.[511] Creation of any such risk management standards must be done in consultation with the Federal Reserve and the Council.

b. CPSS–IOSCO Standards

As noted above, the final FMI Report was published on April 16, 2012 to replace the earlier CPSS–IOSCO

[494] *See RCCP, supra* note 33, at 1.

[495] *See id.*

[496] A natural monopoly is one in which the economies of scale make having a single provider more efficient (lower average cost) than having multiple competitors.

[497] *See* 15 U.S.C. 78q–1(b). *See also* Public Law 111–203 § 763(b) (adding subparagraph (g) to Section 17 of the Exchange Act).

[498] *See* 17 CFR 240.17Ab2–1.

[499] *See supra* note 5.

[500] *See* 15 U.S.C. 78q–1(d).

[501] *See supra* note 5.

[502] *See supra* note 20.

[503] *See* 15 U.S.C. 78c–3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act).

[504] 15 U.S.C. 78q–1(i).

[505] Under the Exchange Act, a clearing agency can be registered with the Commission only if the Commission makes a determination that the clearing agency satisfies the requirements set forth in paragraphs (A) through (I) of Section 17A(b)(3) of the Exchange Act. 15 U.S.C. 78q–1(b)(3).

[506] *See supra* Section I.A.3.

[507] *See supra* note 25.

[508] 15 U.S.C. 78q–1(i).

[509] 12 U.S.C. 5464(a)(1).

[510] Certain post-trade processing activities that are not captured by the Clearing Supervision Act may nevertheless be subject to regulation by the Commission under the Exchange Act. *See supra* note 100 and accompanying text.

[511] *See supra* note 27.

Recommendations and therefore represents a new reference point of international standards contemplated by the Exchange Act and the Clearing Supervision Act relevant for actions taken by the Commission.[512] The FMI Report recognizes that FMIs can differ significantly in design, organization and function and that certain principles are not applicable to certain types of FMIs. The principles are designed therefore to be applied holistically, and the Final Report expressly provides flexibility in terms of how FMIs will apply the principles. The clearing agencies registered with the Commission have generally implemented the CPSS–IOSCO Recommendations. The FMI Report states that financial market infrastructures (including CCPs and CSDs) are expected to observe the principles contained in the FMI Report through ''appropriate and swift action'' consistent with the national laws of their home jurisdictions.[513]

c. Complementary Regulation by Other Regulators

Rule 17Ad–22 and the rules for DCOs adopted by the CFTC[514] are generally consistent. The CFTC also incorporates some of the CPSS–IOSCO Recommendations by rule to supplement the DCO core principles of the Commodity Exchange Act (''CEA''). Nevertheless, there are some differences between the rules the Commission is adopting today and those of the CFTC.

First, Rule 17Ad–22(b)(1) requires a CCP to measure its credit exposures to its participants at least once a day while the CFTC's DCO rules require that DCOs perform that function periodically throughout the day. Second, consistent with the current practice at registered CCPs providing clearing of security-based swaps, Rule 17Ad–22(b)(3) requires CCPs for security-based swaps to maintain enough financial resources to withstand a default by the two largest participant families.[515] All other CCPs would be required to be able to withstand a default by the single largest participant family, for the reasons discussed in Section V.C below.

The CFTC applies the latter standard to all DCOs. In its October 2010 rule proposal, the CFTC proposed requiring that systemically important DCOs maintain sufficient financial resources to meet their financial obligations to their clearing members notwithstanding a default by the two clearing members creating the largest combined financial exposure for the systemically important DCO in extreme but plausible market conditions.[516] The CFTC did not adopt this proposal as part of its final rules for DCOs. The CFTC stated that it was premature to adopt this rule for the following reasons: (1) The Council had not designated any DCOs as systemically important; (2) the final FMI Report had not been published; and (3) EMIR was not final.[517] The CFTC stated that it would be closely monitoring developments and would be prepared to revisit the issue if the European Union or other foreign regulators move closer to implementation of their respective reforms.[518]

Third, Rule 17Ad–22(b)(4) requires model validations to be performed ''annually'' by a person who is free from influence from the persons responsible for development or operation of the systems and models being validated so that he or she can be candid in his or her assessment of the model. The CFTC rule requires an ''independent'' validation on a ''regular basis.''

Fourth, Rule 17Ad–22(b)(7) provides for scalability of net capital requirements in proportion to the riskiness of the participants' activities and permits CCPs to seek Commission approval to impose a net capital requirement on participants that is higher than $50 million. In contrast, the CFTC's DCO rules do not provide for scalability and do not allow DCOs the option to seek approval for a higher net capital requirement.

Finally, a DCO is required to publicly disclose its margin-setting methodology and default procedures on its Web site. Rule 17Ad–22(d)(11) requires a clearing agency to make key aspects of its default procedures publicly available, but nothing in the rules the Commission is adopting today would require publication of the clearing agency's margin methodology.

2. Current Practices

An overview of the risk management practices, operations, policies and procedures of registered clearing agencies is set forth below. The discussions under the headings ''Risk Management—Measurement of credit exposures,'' ''—Margin'' ''—Financial Resources'' and under the heading ''Other Clearing Services'' are based upon public representations[519] made by registered clearing agencies regarding their compliance with the CPSS–IOSCO Recommendations and upon the Commission's observations with regard to registered clearing agencies developed in carrying out its supervisory role. The discussion under the heading ''Risk Management—Model Validation'' is based upon the Commission's observations with regard to registered clearing agencies in its supervisory role. The Commission notes that the practices observed at registered clearing agencies generally are performed pursuant to stated practices, policies and procedures as described below.[520]

a. Risk Management Practices

i. CCP Practices as They Relate to Rules 17Ad–22(b)(1)–(4)

CCPs have a range of tools that can be used to manage the financial risks to which they are exposed, and the tools that an individual CCP uses will depend upon the nature of its obligations. Nonetheless, there is a common set of procedures that are implemented by many CCPs to manage counterparty credit and liquidity risks. Broadly, these procedures enable CCPs to manage their risks by limiting the likelihood of defaults, by limiting the potential losses and liquidity pressures if a default should occur, and by ensuring that there are adequate resources to cover losses and meet payment obligations on schedule.

To manage its counterparty credit exposures to its participants effectively, a clearing agency must be able to measure those exposures. A clearing agency can ascertain its current credit exposure to each participant by marking each participant's outstanding contracts to current market prices and (to the extent permitted by a clearing agency's rules and supported by law) netting any gains against any losses. A clearing agency faces the risk that its exposure to

[512] *See supra* note 32.

[513] *See RSSS and RCCP Reports, supra* note 33.

[514] *See* 76 FR 69334 (Nov. 8, 2011).

[515] *See supra* Section III.C.3.

[516] *See Financial Resources Requirements for Derivatives Clearing Organizations,* 75 FR 63113 (Oct. 14, 2010).

[517] *See id.* at 69352.

[518] We note that EMIR requires all CCPs to maintain sufficient financial resources to withstand the default of the two participants with the largest exposures. *See supra* note 167 at 43. EMIR was adopted in July 2012. *See supra* note 167.

[519] *See, e.g.,* NSCC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Nov. 14, 2011), *available at http://www.dtcc.com/legal/compliance/NSCC_Self_Assessment.pdf;* DTC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 12, 2011), *available at http://www.dtcc.com/legal/compliance/DTC_Self-Assessment.pdf;* FICC/GSD's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 15, 2011), *available at http://www.dtcc.com/legal/compliance/FICC_Self-Assessment.pdf.*

[520] Registered clearing agencies are SROs as defined in Section 3(a)(26) of the Exchange Act. A stated policy, practice, or interpretation of an SRO, such as a clearing agency's written policies and procedures, would generally be deemed to be a proposed rule change. *See* 17 CFR 240.19b–4. *See supra* note 293.

a participant can change as a result of a change in prices, in positions, or both.

The current practice of each CCP registered with the Commission includes these procedures: (1) Measuring credit exposures at least once a day; (2) setting margin coverage at a 99% confidence level over some set period; (3) using risk-based models; (4) establishing a fund that mutualizes losses of defaults by one or more participants that exceed margin coverage; and (5) maintaining sufficient financial resources to withstand the default of at least the largest participant,[521] and in the case of security-based swap transactions, maintaining enough financial resources to be able to withstand the default of their two largest participants.[522]

1. Measurement of Credit Exposures

Currently, registered clearing agencies measure credit exposures at least once per day. Clearing agencies that guarantee trades on the trade date, such as the FICC/GSD and OCC, measure credit exposures multiple times per day. NSCC does not guarantee trades until midnight of T+1, and it only measures credit exposures daily, though it is considering an accelerated trade guarantee proposal that would potentially revise these practices.[523]

2. Margin

Clearing agencies use risk-based models to set initial and variation margin. Inputs to the margin calculation include, among other things, portfolio size, asset price volatility, current asset values, the likely liquidity of the asset should a particular market maker fail (market-maker domination charges), the likely time it would take to liquidate the assets, potential correlations between the value of assets posted as collateral and the assets being cleared, and the correlation of the prices in the portfolio of assets being cleared by the participant.

The current practice of many CCPs registered as clearing agencies is to calculate daily margin requirements using risk-based models to ensure coverage at a 99% confidence interval over a designated time horizon. Losses beyond this level are typically covered by the CCP's guaranty fund. This standard is consistent with the RCCP, which has been the internationally accepted minimum standard for CCPs.[524] The RCCP advises that CCPs use margin and other risk control mechanisms to limit exposures to potential losses from defaults by participants in normal market conditions. The generally recognized standard for normal market conditions, as defined in the RCCP, is price movements that produce changes in exposures that are expected to breach margin requirements or other risk controls only 1% of the time (*i.e.,* at a 99% confidence interval).[525]

This standard comports with the international standard for bank capital requirements established by the Bank for International Settlements, which requires banks to measure market risks at a 99% confidence interval when determining regulatory capital requirements.[526] At the time the Basel Committee on Banking Supervision (the ''Committee'') contemplated this standard, banks measured value-at-risk using a range of confidence intervals from 90–99%.[527] When determining the minimum quantitative standards for calculating risk measurements, the Committee noted the importance of specifying ''a common and relatively conservative confidence level,'' choosing the 99% confidence interval over the other, less conservative measures.[528] Since adopted by the Committee in 1998, it has become a generally recognized practice of banks to quantify credit risk as the worst expected loss that a portfolio might incur over an appropriate time horizon at a 99% confidence interval.[529]

3. Financial Resources

All clearing agencies that act as CCPs in the United States collect contributions from their members to guaranty funds or clearing funds for the mutualization of losses under extreme but plausible market scenarios. The guaranty funds or clearing funds consist of liquid assets, the sizes of which vary depending on the products that the CCP clears. In particular, the guaranty funds for CCPs that clear security-based swaps are relatively larger (as measured by the size of the fund as a percentage of the total and largest exposures) than the guaranty funds or clearing funds for other financial instruments. The guaranty funds for security-based swaps are sized to achieve protection against a default by two participant families to whom the clearing agency has the largest exposures and are designed to protect the clearing agency from the extreme jump-to-default risk associated with large protection sellers. Security-based swap CCPs have organized their security-based swap clearing operations either in a separate legal entity or by establishing a separate fund and separate procedures (rules, membership requirements and risk management practices) within a single legal entity. The registered clearing agencies clearing products other than security-based swaps maintain the financial resources to withstand the default of the single largest participant family.[530]

4. Model Validation

Clearing agencies registered with the Commission typically have a model validation process in place that evaluates the adequacy of margin models, parameters, and assumptions. Current model validation practices vary among clearing agencies. Some registered clearing agencies conduct annual validations, while others conduct them on an ad hoc basis or perform validations on new models or changes to existing models before implementing them. In addition to validating models, registered clearing agencies typically review models used to calculate margin on a regular basis and back-test them regularly to assess the reliability of the methodology in achieving the desired coverage. Based on our experience in supervising registered CCPs, we understand that registered CCPs' approaches to model validation include model validations

[521] *See supra* note 183.

[522] *See supra* note 168.

[523] *See* NSCC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Nov. 14, 2011), at 24, *available at http://www.dtcc.com/legal/compliance/NSCC_Self_Assessment.pdf.*

[524] *See supra* note 74.

[525] *See* Bank for International Settlements' Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, *Recommendations for Central Counterparties,* (Nov. 2004), at 21, *available at http://www.bis.org/publ/cpss64.pdf; see also infra* Section V.B.2 (discussion on current industry baselines and the use of the 99% confidence level).

[526] *See* Bank for International Settlements' Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (June 2004), *available at http://www.bis.org/publ/bcbs107.pdf; see also* Darryll Hendricks and Beverly Hirtle, *New Capital Rule Signals Supervisory Shift* (Sept. 1998), *available at http://www.bis.org/bcbs/ca/alreque98.pdf.*

[527] *See* Bank for International Settlements' Basel Committee on Banking Supervision, An internal model-based approach to market risk capital requirements (Apr. 1995), at 12, *available at http://www.bis.org/publ/bcbs17.pdf.*

[528] *See id.*

[529] *See* Kenji Nishiguchi, Hiroshi Kawai, and Takanori Sazaki, *Capital Allocation and Bank Management Based on the Quantification of Credit Risk,* FRBNY Economic Policy Review (Oct. 1998), at 83, *available at http://www.newyorkfed.org/research/epr/98v04n3/9810nish.pdf; see also* Jeff Aziz and Narat Charupat, *Calculating Credit Exposure and Credit Loss: A Case Study* (Sept. 1998), at 34, *available at http://www.bis.org/bcbs/ca/alreque98.pdf.*

[530] *See, e.g.,* DTC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 12, 2011), *available at http://www.dtcc.com/legal/compliance/DTC_Self-Assessment.pdf.*

conducted by a qualified person who is either an outside third party or is employed by the clearing agency but is free from influence from the persons responsible for the development or operation of the models.

ii. Other Clearing Services (Practices as They Relate to Rule 17Ad–22(d))

1. Legal Risk

Because registered clearing agencies are SROs, they have written policies and procedures in place that, at a minimum, address the significant aspects of their operations and risk management practices.[531] A large portion of these policies and procedures are available to members and participants of clearing agencies, but it is also ordinarily the practice of clearing agencies to limit members' access to certain of their policies and procedures to ensure their integrity, particularly those policies and procedures associated with the oversight of clearing participants. Registered clearing agencies also make their rule books and certain key procedures available to the public to provide a transparent legal framework.[532]

Registered clearing agencies must be able to enforce those policies and procedures and such enforcement powers are specifically contemplated by operative provisions of the Exchange Act, subject to oversight by the Commission.[533] Clearing agency policies and procedures that purport to create remedial measures that a party other than the clearing agency (such as a clearing member) can use to seek redress or to promote compliance with applicable rules must also be enforceable in practice in order to be effective, and the Commission believes that Rule 17Ad–22(d)(1) would augment the Exchange Act requirement that the rules of the clearing agency must provide that its participants shall be appropriately disciplined for any violation of any provision of the rules of the clearing agency.[534]

2. Participation Requirements

Applicants for membership must provide a registered clearing agency with certain financial and operational information prior to being admitted as a member and on an ongoing basis as a condition of continuing membership. The registered clearing agency reviews this information to ensure that the applicant has the operational capability to meet the technical demands of interfacing with the clearing agency. In particular, registered clearing agencies require that an applicant demonstrate that it has adequate personnel capable of handling transactions with the clearing agency and adequate physical facilities, books and records and procedures to fulfill its anticipated commitments to, and to meet the operational requirements of, the clearing agency and other participants with necessary promptness and accuracy and to conform to any condition or requirement that the clearing agency reasonably deems necessary for its protection.

Registered clearing agencies use the ongoing monitoring process to ensure they understand relevant changes in the financial condition of their participants and to mitigate credit risk exposure of the clearing agency to its participants. Financial statements filed with the regulatory agencies, information obtained from other SROs and information gathered from various financial publications are analyzed by risk management staff so that the clearing agency may evaluate whether the participant continues to be financially stable.

3. Custody of Assets and Investment Risk

Registered clearing agencies currently seek to minimize the risk of loss or delay in access by holding assets that are highly-liquid (*e.g.,* cash, U.S. Treasury securities or securities issued by a U.S. government agency) and engaging banks to custody the assets and facilitate settlement. Clearing agencies that are designated systemically important by the Council may be provided account services at the appropriate Federal Reserve Bank to the extent such services are not already available as the result of other laws and regulations.[535] The use of account services at the Federal Reserve Bank would reduce custody risk in clearing agencies that are designated systemically important by the Council.

4. Identification and Mitigation of Operational Risk

Registered clearing agencies develop and maintain plans to assure the safeguarding of securities and funds, the integrity of the Automated Data Processing systems, and recovery of securities, funds, or data under a variety of loss or destruction scenarios.[536] In addition, clearing agencies generally maintain an internal audit department to review the adequacy of the clearing agencies' internal controls, procedures, and records with respect to operational risks. Some clearing agencies also engage independent accountants to perform an annual study and evaluation of the internal controls relating to its operations.[537]

5. Money Settlement Risks

Registered clearing agencies use settlement banks to facilitate the cash portion of securities settlements. Because DTC is organized as a limited purpose trust company and is a member of the Federal Reserve System,[538] it has an account at the Federal Reserve Bank of New York, and uses that account to facilitate end-of-day settlement. NSCC, as an affiliate of DTC, also uses that account.

6. Cost-Effectiveness

Registered clearing agencies have procedures to control costs and to regularly review pricing levels against operating costs. These clearing agencies may use a formal budgeting process to control expenditures, and may review pricing levels against their costs of operation during the annual budget process. Clearing agencies also analyze workflows in order to make recommendations to improve the operating efficiency of the clearing agency.

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[531] *See supra* note 520.

[532] Generally, the rules and procedures of registered clearing agencies can be found on their respective Web sites.

[533] *See* Sections 17A(b)(3)(A), (G), and (H) of the Exchange Act.

[534] *See* 15 U.S.C. 78q–1(b)(3)(G).

[535] *See* Section 806(a) of the Clearing Supervision Act. ''The Board of Governors may authorize a Federal Reserve Bank to establish and maintain an account for a designated financial market utility and provide the services listed in section 11A(b) of the Federal Reserve Act (12 U.S.C. 248a(b)) and deposit accounts under the first undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 342) to the designated financial market utility that the Federal Reserve Bank is authorized under the Federal Reserve Act to provide to a depository institution, subject to any applicable rules, orders, standards, or guidelines prescribed by the Board of Governors.'' 12 U.S.C. 5465(a).

[536] These practices, among others, have been developed pursuant to Commission guidelines. *See* Automation Review Policy Statements, *supra* note 330.

[537] *See* NSCC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Nov. 14, 2011), *available at http://www.dtcc.com/legal/compliance/NSCC_Self_Assessment.pdf.*

[538] *See* Section 806(a) of the Dodd-Frank Act (''The Board of Governors may authorize a Federal Reserve Bank to establish and maintain an account for a designated financial market utility and provide the services listed in Section 11A(b) of the Federal Reserve Act (12 U.S.C. 248a(b)) and deposit accounts under the first undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 342) to the designated financial market utility that the Federal Reserve Bank is authorized under the Federal Reserve Act to provide to a depository institution, subject to any applicable rules, orders, standards, or guidelines prescribed by the Board of Governors.'').

7. Links

Each registered clearing agency is linked to other clearing organizations, trading platforms, and service providers. An example of such a link is DTC Canadian Link Service, which allows qualifying DTC participants to clear and settle valued securities transactions with participants of a Canadian securities depository. The link is designed to facilitate cross-border transactions by allowing participants to use a single depository interface for U.S. and Canadian dollar transactions and eliminate the need for split inventories.[539]

8. Governance

Each registered clearing agency has a board that governs the operations of the entity and supervises senior management. The key components of a clearing agency's governance arrangements include the clearing agency's ownership structure, the composition and role of its board, the structure and role of board committees, reporting lines between management and the board, and the processes that ensure management is held accountable for the clearing agency's performance.

9. Information on Services

Because registered clearing agencies are SROs, their rules are published by the Commission and are available on each clearing agency's Web site. In addition, information regarding the operations and services of each clearing agency can be found either on the clearing agency's Web site or a Web site maintained by an affiliated entity of the clearing agency.

10. Immobilization and Dematerialization of Securities Certificates

Virtually all mutual fund securities, government securities, options, and municipal bonds in the United States are dematerialized, and most of the equity and corporate bonds in the U.S. market are either immobilized or dematerialized; some securities (*e.g.,* mutual fund shares, U.S. Treasury bills) are issued on a completely dematerialized basis, while most securities issued to the public are issued in the form of one or more physical certificates. Through the end of 2010, over 99% of municipal and corporate debt by par value distributed through DTC was in book-entry-only form.[540] DTC estimates that in excess of 90% of the corporate and municipal securities issued to the public in the United States are distributed through DTC and are represented by one or more physical certificates that are immobilized at the depository.[541]

11. Default Procedures

Each registered clearing agency makes publicly available rules, policies or procedures that set forth the actions the clearing agency may take in the event of a participant default, with the exception of certain of their policies and procedures that are kept non-public to ensure their integrity, such as those associated with the oversight of clearing participants. For example, clearing agency rules typically state what constitutes a default, identify whether the board or a committee of the board may make that determination and describe what steps the clearing agency may take to protect itself and its participants. In this regard, clearing agencies typically attempt, among other things, to close-out, to hedge or to liquidate a defaulting participant's positions.

12. Timing of Settlement Finality

Each registered clearing agency has rules, policies or procedures that provide for the settlement of their respective securities transactions no later than the end of a pre-defined settlement day. For example, DTC provides for final settlement of securities transfers no later than the end of the day and the timing of finality is clearly defined. Final cash settlement occurs at the end of the processing day at DTC. Funds transfers through DTC's account at the Federal Reserve Bank of New York that occur between DTC and a settling bank that is acting on behalf of a DTC participant are final when made.

13. Delivery Versus Payment

Rule 17Ad–22(d)(13) would apply to registered clearing agencies that provide CSD services. DTC currently is the only registered clearing agency that is a CSD. DTC operates a Model 2 DVP system that provides for gross settlements of securities transfers during the day followed by an end of day net funds settlement.[542] Under DTC's rules, in a DVP transaction, the delivering party is assured that it will be paid for the securities once they are credited to the receiving party's securities account.[543]

14. Risk Controls To Address Participant's Failure To Settle

The sole registered clearing agency providing CSD services, DTC, which also extends limited intraday credit to participants, has policies and procedures in place to ensure that timely settlement can be completed in the event of the default of the participant with the largest settlement obligation. DTC has policies and procedures to establish limits (called net debit caps) for each participant. The net debit cap ensures that the amount of cash that a participant owes the clearing agency at any one point in time does not exceed this pre-defined limit or cap. The net debit cap is set in relation to a participant's normal activity with the maximum net debit cap for an individual participant currently set at $1.8 billion. DTC also has implemented other risk management controls to help ensure settlement. For example, DTC monitors the value of the collateral supporting each participant's net debit in its settlement system based on the security's prior business day's closing market price, less a haircut, which is based primarily upon the availability of prices, ratings, and the price volatility of the particular security.

15. Physical Delivery Risks

Each registered clearing agency has rules and procedures that describe its obligations to its participants when it assumes deliveries of physical instruments. For example, under NSCC's rules governing its continuous net settlement (''CNS'') system, NSCC becomes the contra-party for settlement purposes at the point NSCC's trade guarantee attaches, thereby assuming the obligation of its members that are receiving securities to receive and pay for those securities, and the obligation of members that are delivering securities to make the delivery. Unless NSCC has invoked its default rules, NSCC is not obligated to make those deliveries until it receives from members with delivery obligations deliveries of such securities; rather, deliveries that come into CNS ordinarily are promptly redelivered to parties that are entitled to receive them through an allocation algorithm. Members are obligated to take and pay for securities allocated to them in the CNS process. NSCC's rules also provide mechanisms allowing receiving members a right to receive high priority in the allocation of deliveries, and also permit a member to buy-in long positions that have not been delivered to it by the close of business on the scheduled settlement date.

[539] *See infra* note 617.

[540] *See DTCC White Paper, supra* note 389.

[541] *See id.*

[542] *See* DTC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 12, 2011), *available at http://www.dtcc.com/legal/compliance/DTC_Self-Assessment.pdf.*

[543] *See id.*

b. Participant Access (Practices as They Relate to Rules 17Ad–22(b)(5)–(7))

To address credit risk management, clearing agencies establish requirements for participants' financial resources, creditworthiness, and operational capability, and maintain procedures to ensure ongoing compliance with their rules. In its regulatory capacity overseeing clearing agencies, Commission staff has observed that applicants for clearing agency membership must demonstrate standards of financial responsibility, operational capability and character. Specific criteria used by clearing agencies address the extent and nature of the business the applicant intends to conduct through the clearing agency and the applicant's capital resources and financial stability, including factors bearing on its financial capability to meet its projected clearing agency obligations.[544]

As of December 31, 2011, registered CCPs (including those clearing nontraditional securities such as credit default swaps) had the following numbers of members:

- FICC—302 members
- NSCC—187 full members; 647 limited members
- OCC—120 members
- CME—64 members
- ICE Clear Credit—27 members
- ICE Clear Europe—60 members

CCPs for traditional securities already have rules regarding access and membership. All CCPs for traditional securities allow non-dealer members, and none of them have minimum portfolio size or trading volume thresholds.[545] In addition, the minimum capital requirements to access these CCPs range from $500,000 to $10,000,000.

Certain clearing agencies that provide CCP services for security-based swap transactions, however, have required members to have significant minimum portfolio sizes or trading volumes, meet significantly higher minimum capital requirements, and require members to operate a dealer business. Such requirements may present challenges to new liquidity providers in the relevant market. The CCPs argue that these requirements are necessary to mitigate the risk exposure of the CCP in the event of default by a clearing member.[546] For example, because markets for credit default swaps are generally less liquid than markets for exchange-traded derivatives, traditional procedures for a CCP to handle a member default may not be effective. The traditional procedures for handling a default, which are used by CCPs for most exchange-traded derivatives, call for the CCP to terminate all of its contracts with the defaulting participant and promptly enter the market and replace the contracts, so as to hedge against further losses on the open positions created by termination of the defaulter's contracts. But if the markets for the contracts cleared by the CCP are illiquid, prompt replacement of the contracts may induce adverse price movements, especially if the defaulting participant's positions are large. Consequently, the application of traditional default procedures to illiquid credit default swaps contracts may entail significant risk to the CCP.

To address this potential risk, these CCPs developed a default management process that requires traders from their clearing members to be seconded to the CCP to manage the defaulter's portfolio. They would be charged with neutralizing the market risk in the portfolio by entering into new OTC derivative contracts with non-defaulting clearing members. Once neutralized as much as possible, the portfolio would be divided and auctioned to non-defaulting members. The CCP would determine a reservation price for the auction, and if a non-defaulting clearing member's bid exceeds that reservation price, the auction would be deemed successful. If not, the auction would fail. In the event of a failed auction, the portfolio would be divided among the non-defaulting clearing members pro rata based on their volumes of business. Under this process, a non-defaulting CCP participant would bear the risk of entering the markets to hedge open positions created by a default only if it is a successful bidder or if one or more auctions fail and it is assigned positions because it has outstanding positions with the CCP.

This process creates a tension between the need for effective default management procedures and the maintenance of fair and open access to a CCP's services. Because of the stringent capital and other requirements imposed by the CCP's membership standards, membership in a CCP clearing security-based swaps generally has been limited to very large dealers, those meeting the outstanding swap portfolio amount and capital requirements. Current members may also have an incentive to exclude new members, either to manage counterparty risk or to block competitors. Being a member of a CCP may provide a competitive boost to a new member that is a smaller dealer by allowing the CCP's creditworthiness to be substituted for that of the new member. Requirements that prevent smaller dealers from entering as new members may, therefore, undermine competition and the entry of new liquidity providers in the relevant market. Indeed, one committee argues that access criteria in credit default swaps have had the effect of excluding market participants such as mid-tier financial institutions and buy-side firms from direct access to CCPs.[547] While such requirements have to date been adopted only by CCPs that engage in the clearance and settlement of credit default swaps, the Commission believes that preventing the introduction of such requirements also may be an important consideration for other types of instruments.

c. Disclosure of Financial Information (Practices as They Relate to Rule 17Ad–22(c))

Currently, there is no rule requirement under the Exchange Act or Commission rule that mandates clearing agencies to record and maintain information about their financial resources. Nevertheless, as part of their ordinary risk management procedures developed in consultation with their members, clearing agencies produce at least quarterly internal reports regarding the ability of the CCP to withstand a default by the participant (or two participants) to which the clearing agency has the largest exposure in extreme but plausible market conditions. In addition, as part of the Commission's supervision, oversight and monitoring of clearing agencies, the Commission staff can obtain such information on request. However, clearing agencies do not all currently

[544] *See, e.g.,* International Monetary Fund, *Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Observance of the NSCC's Observance of the CPSS–IOSCO Recommendations for Central Counterparties* (2010), at 6–8, *available at http://www.imf.org/external/pubs/ft/scr/2010/cr10129.pdf; IMF's Detailed Assessment of Observance of the Fixed Income Clearing Corporation—Government Securities Division's Observance with the CPSS–IOSCO Recommendations for Central Counterparties, performed in connection with the Financial Sector Assessment Program of the United States in 2010,* at 6–8, *available at www.imf.org/external/pubs/ft/scr/2010/cr10130.pdf.*

[545] *See infra* discussion of Rules 17Ad–22(b)(5), (6) and (7) in Section V.C.5 (benefits and costs of broad access requirements and non-dealer membership).

[546] *See generally* Bank for International Settlements, *New Developments in Clearing and Settlement Arrangements for OTC Derivatives* (Mar. 2007), at 27–29.

[547] *See* Committee on the Global Financial System, *The Macrofinancial Implications of Alternative Configurations for Access to Central Counterparties in OTC Derivatives Markets* (Nov. 2011), at 9.

record and maintain documentation that explains the methodology used to compute their financial resource requirements as required by Rule 17Ad–22(b)(3).

Commission staff guidance to clearing agencies provides that clearing agencies should provide, within 60 days following the close of the clearing agency's fiscal year, audited annual financial statements to those participants who have made clearing fund contributions and/or have money and/or securities in the clearing agency's systems.[548] With one exception, the clearing agencies report their accounting information in U.S. GAAP.[549] At present, clearing agencies publish annual audited financial statements on their respective Web sites and provide unaudited quarterly and annual audited financial statements to their members.[550] All the clearing agencies currently have their financial statements audited in accordance with the standards of the PCAOB by a registered public accounting firm, and when the financial statements are posted on their Web sites, the clearing agencies include the report of the auditor.

d. Comparison of Current Practices and Rule to CPSS–IOSCO Recommendations as Related to Rules 17Ad–22(b)(1)–(3) and (d)

In 2009, based upon an agreement reached with the U.S. Department of Treasury, the operations of several U.S. clearing agencies were assessed by independent assessors from the IMF against the CPSS–IOSCO Recommendations.[551] The IMF's assessments supported a finding of full or broad observance of the CPSS–IOSCO Recommendations by each of the clearing agencies registered with the Commission at that time. Further, CME, ICE Clear Credit and ICE Clear Europe represented to the Commission that they met the standards set forth in the RCCP when they sought to obtain an exemption from the Commission to provide CCP services for credit default swaps transactions.[552] Only one CCP, OCC, has not either been subject to an assessment using the RCCP or publicly stated its view on whether it complies with the RCCP.[553] Rules 17Ad–22(b)(1), (2), (3) and (d) are largely modeled on the CPSS–IOSCO Recommendations and therefore are largely consistent with observed practices.

The table below maps the requirements of Rules 17Ad–22(b)(1)–(3) and (d) to the corresponding CPSS–IOSCO Recommendations.

COMPARISON OF RULE 17AD–22 TO CPSS–IOSCO RCCP AND RSSS STANDARDS

Rule 17Ad–22	CPSS–IOSCO RCCP and RSSS
17Ad–22 (b)(1): Measurement and management of credit exposures	RCCP Recommendation 3.
17Ad–22 (b)(2):Margin requirements	RCCP Recommendation 4.
17Ad–22 (b)(3): Financial resources	RCCP Recommendation 5.[554]
17Ad–22 (d)(1): Transparent and enforceable rules	RCCP Recommendation 1 and RSSS Recommendation 1.
17Ad–22 (d)(2): Participation requirements	RCCP Recommendation 2 and RSSS Recommendation 2.
17Ad–22 (d)(3): Custody of assets and investment risk	RCCP Recommendation 7 and RSSS Recommendation 7.
17Ad–22 (d)(4): Identification and mitigation of operational risk	RCCP Recommendation 8 and RSSS Recommendation 11.
17Ad–22 (d)(5): Money settlement risks	RCCP Recommendation 9 and RSSS Recommendation 10.
17Ad–22 (d)(6): Cost-effectiveness	RCCP Recommendation 12 and RSSS Recommendation 15.
17Ad–22 (d)(7): Links	RCCP Recommendation 10 and RSSS Recommendation 19.
17Ad–22 (d)(8): Governance	RCCP Recommendation 13 and RSSS Recommendation 13.
17Ad–22 (d)(9): Information on services	RCCP Recommendation 14 and RSSS Recommendation 17.
17Ad–22 (d)(10): Immobilization and dematerialization of securities certificates	RSSS Recommendation 6.
17Ad–22 (d)(11): Default procedures	RCCP Recommendation 6.
17Ad–22 (d)(12): Timing of settlement finality	RSSS Recommendation 8.
17Ad–22 (d)(13): Delivery versus payment	RSSS Recommendation 7.
17Ad–22 (d)(14): Controls to address participants' failure to settle	RSSS Recommendation 9.
17Ad–22 (d)(15): Physical delivery risks	RCCP Recommendation 10.

[548] *See* Exchange Act Release No. 16900 (June 17, 1980). Because BSECC and SCCP do not conduct clearance and settlement operations they do not post audited financial statements. *See supra* note 438.

[549] ICE Clear Europe posts financial statements in UK GAAP.

[550] *See* DTC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 12, 2011), *available at http://www.dtcc.com/legal/compliance/DTC_Self-Assessment.pdf;* NSCC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Nov. 14, 2011), *available at http://www.dtcc.com/legal/compliance/NSCC_Self_Assessment.pdf;* FICC/GSD's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 15, 2011), *available at http://www.dtcc.com/legal/compliance/FICC_Self-Assessment.pdf.*

[551] *See supra* note 183.

[552] *See generally* Securities Exchange Act Release No. 60372 (July 23, 2009), 74 FR 37748 (July 29, 2009) (temporary exemptions in connection with CDS clearing by ICE Clear Europe); Securities Exchange Act Release No. 60373 (July 23, 2009), 74 FR 37740 (July 29, 2009) (temporary exemptions in connection with CDS clearing by Eurex Clearing AG); Securities Exchange Act Release No. 59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009) (''March 2009 CME order'') and Securities Exchange Act Release No. 61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009) (''December 2009 CME order'') (temporary exemptions in connection with CDS clearing by CME); Securities Exchange Act Release No. 59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Securities Exchange Act Release No. 61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009), and Securities Exchange Act Release No. 61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010) (temporary exemptions in connection with CDS clearing by ICE Trust U.S. LLC).

[553] Nevertheless, the Commission has approved a proposed rule change by OCC that revised its clearing fund formula so that it would be the larger of either of the following events: (1) The default of the largest single clearing member group; or (2) an event involving the near-simultaneous default of two randomly-selected clearing member groups. For a more complete description of the proposed rule change, see discussion of the costs of Rule 17Ad–22(b)(3).

[554] RCCP Recommendation 5: Financial Resources states that ''[a] CCP should maintain sufficient financial resources to withstand, at a minimum, a default by the participant to which it has the largest exposure in extreme but plausible market conditions.'' The explanatory note states that this should be viewed as a minimum standard and that planning by a CCP should consider the potential for two or more participants to default in a short time frame. Rule 17Ad–22(b)(3) requires that a clearing agency that provides CCP services maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions; provided that a security-based swap clearing agency shall maintain sufficient financial resources to withstand, at a minimum, a default by the two participant families to which it has the largest exposures in extreme but plausible market conditions.

C. Consideration of Costs, Benefits, and the Effect on Efficiency, Competition and Capital Formation

1. Overview

The purpose of each rule being adopted today is to enhance the regulatory framework for registered clearing agencies. This regulatory framework will facilitate ongoing compliance with the statutory requirements that clearing agencies have rules that facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions for which they are responsible, and safeguard funds and securities. The rules do so by requiring certain minimum standards. The Commission believes that these requirements will help ensure resilient and cost-effective clearing agency operations as well as promote transparency that would consequently support confidence among market participants in clearing agencies' ability to serve as efficient and financially stable mechanisms for clearance and settlement and to facilitate capital formation.

In addition, the rules relating to membership requirements will help facilitate broad participation and open access to clearing agencies. If the rules enhance market participation by investors, the rules may thereby increase price competition, discovery, and price efficiency in the securities cleared by the clearing agency.

Taken together, the rules are largely consistent with existing industry practices. In particular, Rules 17Ad–22(b)(1)–(3) and (d) are modeled on the CPSS–IOSCO Recommendations, which have been in place since 2004 and are generally observed by all clearing agencies. Rule 17Ad–22(c)(2) would codify the existing practice of most registered clearing agencies of maintaining certain financial information on their Web sites. Registered CCPs already disclose their annual audited financial statements on their Web sites, and all except for one registered CCP prepare such financial statements using U.S. GAAP or IFRS.[555] By codifying existing practices, the rules ensure that these benefits are being achieved with minimal need for change or for disruption to the affected industry, while also providing new entrants with legal certainty and transparency in meeting regulatory standards. At the same time, the rules have been written to accommodate changes in technology and market developments. Lastly, Rules 17Ad–22(b)(4) and (b)(5)–(7) establish new minimum practices for clearing agencies with regard to model validation and membership practices respectively.

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 17Ad–22, as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were discussed in the analysis.

The Commission carefully considered all comments received on the Proposing Release. The comments are discussed above in Section III in relation to each part of Rule 17Ad–22. In particular, the Commission carefully considered comments setting forth alternatives to the requirements contained in Rule 17Ad–22. The discussion immediately below takes into account the alternatives proposed by commenters. Several commenters argued that Rule 17Ad–22(d) should not apply to entities that perform certain post-trade processing services (*i.e.,* comparison of trade data, collateral management and tear-up/compression).[556] In response to those comments, the Commission has limited the scope of Rule 17Ad–22 to clearing agencies that are registered with the Commission.

As discussed above, many of the provisions in Rule 17Ad–22 are modeled on the CPSS–IOSCO Recommendations. As a general alternative to prescribing its own requirements under Rule 17Ad–22, the Commission considered requiring registered clearing agencies to perform self-assessments using the CPSS–IOSCO Recommendations. This approach would have been similar to the Board's amendment to its Payment System Risk Policy Statement that directed certain systemically important entities to conduct self-assessment using the CPSS–IOSCO Recommendations.[557] The Commission decided against this alternative because the Commission believes that it would be more appropriate for the Commission to require registered clearing agencies to conduct assessments against Commission rules because the Commission's regulatory approach relies on examining and inspecting for compliance with, and, if necessary, enforcing, a clear set of rules. Lastly, the Commission also considered alternatives to each of the individual provisions of Rule 17Ad–22, which are discussed in more detail below.

The Commission believes the resulting revised regulatory framework should enhance confidence in the market and better serve market participants. With the adoption of these rules, clearing agencies will be well-positioned to withstand market volatility and evolve with market developments and technological advancements. Establishing rules that are consistent with current practice minimizes up-front costs and provides a good starting point for promoting appropriate risk management practices. As clearing agency practices evolve over time in response changes in technology, legal requirements and other factors, clearing agencies may need to make appropriate updates and improvements to their operations and risk management practices, and as a result, actual costs of ongoing compliance with Rule 17Ad–22 may differ from the estimates discussed below.

The following addresses the entire rule and each rule provision being adopted today, its purpose, benefits and costs, and the impact of the rule on efficiency, competition and capital formation.[558]

2. Purpose of Rule 17Ad–22

The adoption by the Commission of Rule 17Ad–22 should benefit the U.S. financial markets in several ways. Because market participants and regulatory authorities are familiar with the CPSS–IOSCO Recommendations upon which Rule 17Ad–22 is based, the provisions being adopted today will increase the consistency among regulatory frameworks worldwide and thus diminish the opportunities for regulatory arbitrage. Since their publication in 2001, and 2004, respectively, the RSSS and RCCP have been used by the World Bank and IMF in numerous technical assistance and FSAP missions.[559] Regulators from

[555] ICE Clear Europe posts financial statements prepared in accordance with UK GAAP.

[556] *See generally* TriOptima Letter; Markit (April) Letter; Markit (July) Letter; MarkitSERV (April) Letter; MarkitSERV (July) Letter; Omgeo Letter.

[557] *See supra* note 33.

[558] Section 3(f) of the Exchange Act requires the SEC, whenever it engages in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the SEC from adopting any such rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

[559] Between 2000 and 2009, 35 securities settlement systems were assessed against the RSSS in 22 countries during FSAP and FSAP update

multiple jurisdictions also have assessed the operations of clearing organizations using the RSSS and RCCP and incorporated them into their regulatory frameworks.[560] The CPSS–IOSCO Recommendations have been used as a recognized standard for market participants and regulators to compare the operations of CCPs and CSDs.

The establishment of consistent standards for CCP and CSD operations is an important goal that underpinned the enactment of Section 17A of the Exchange Act. When Congress adopted Section 17A, as part of the 1975 Amendments to the Securities Act (''1975 Amendments''), it determined that the implementation of linked systems for clearance and settlement and uniform standards would reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors. The legislative history noted that when broker-dealers must deal with a dozen or more different clearing and depository systems in their daily securities operations, the result is excessive cost and poorer service to investors.[561] Rule 17Ad–22 establishes minimum standards for the operations and risk management practices for clearing agencies that are consistent with the standards for CCPs and CSDs operating domestically and in other jurisdictions.

Furthermore, Rule 17Ad–22 will have the benefit of serving as a minimum benchmark for the Commission in making its required determinations regarding the rules of registered clearing agencies. For example, for a clearing agency to be registered under Section 17A, the Commission must find that it has the ability to facilitate the prompt and accurate clearance and settlement of transactions, to safeguard investor funds and securities, to remove impediments to and to perfect the mechanism of a national clearance and settlement system, and in general to protect investors and the public interest. Also, the clearing agency's rules must provide adequate access to qualified participants, fair representation of shareholders and participants, equitable pricing, discipline of participants, and must not impose any undue burden on competition.

Rule 17Ad–22 will also have the benefit of augmenting the Commission's ability to regulate clearing agencies. Because clearing agencies are SROs, after a clearing agency has been registered with the Commission, the clearing agency must submit proposed rule changes to the Commission for approval under Exchange Act Rule 19b–4. To approve a clearing agency's proposed rule change, the Commission must find that it complies with Section 17A. The minimum benchmark established by Rule 17Ad–22 will help ensure and demonstrate that the existing operations of clearing agencies and their proposed rule changes meet or exceed international standards while remaining appropriate for the individual clearing agency. As a result, a clearing agency cannot use Rule 17Ad–22 to reduce the strength of its operational standards or adopt a new policy or procedure that the Commission believes does not meet the requirements of Section 17A.

Finally, the Commission believes Rule 17Ad–22 will help market participants be in a position to better compare the operations of U.S. clearing agencies with non-U.S. clearing organizations. In addition, the Commission's adoption of Rule 17Ad–22 will lead to greater confidence, both domestically and internationally, in the resiliency of clearing agencies and their ability to support the U.S. financial markets. The Commission's adoption of Rule 17Ad–22 may also reduce some of the potential regulatory burden for CCPs and CSDs that may be dually-regulated by the SEC and another domestic or foreign regulator because it is modeled on standards already employed by other regulatory authorities.

Below we discuss a number of costs and benefits that are related to the rule being adopted today. Many of these costs and benefits are difficult to quantify with any degree of certainty, especially as practices at clearing agencies are anticipated to evolve and appropriately adapt to changes in technology and market developments. In addition, the extent to which the increased ability to enforce standards that are incorporated in the rule will help limit future risks is unknown. Moreover, this difficulty is aggravated by the fact that limited public data exists that is related to a clearing agency's risk management practices that could assist in quantifying certain costs. Therefore, much of the discussion is qualitative in nature but where possible, we quantify the costs.

Many, but not all, of the costs of the rule involve a collection of information, and these costs and burdens were discussed in the Paperwork Reduction Act section. When monetized [562] those estimated burdens and costs total $3.7 million [563] in initial costs and $10.1 million [564] in annual ongoing costs. A detailed discussion of other economic

missions. *See* Presentation by Massimo Cirasino, World Bank, and Christine Sampic, IMF, Financial Infrastructure Week, Rio de Janeiro, Brazil (Mar. 15, 2011).

[560] For example, the Board also has proposed a rule that is modeled on the CPSS–IOSCO Recommendations and substantially similar to Rule 17Ad–22. *See* 76 FR 18452 (Apr. 4, 2011).

[561] S. Rep. 94–75, 94th Cong., 1st Sess., at 184 (1975).

[562] To monetize the internal costs the Commission staff used data from the SIFMA publications, *Management and Professional Earnings in the Security Industry—2010,* and *Office Salaries in the Securities Industry—2010,* modified by the Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead.

[563] The total initial cost was calculated as follows: [for Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15) (Assistant General Counsel for 60 hours at $430 per hour) + (Compliance Attorney for 85 hours at $320 per hour) + (Computer Operations Department Manager for 15 hours at $367 per hour) + (Senior Business Analyst for 15 hours at $232 per hour) = $61,985 × 10 respondents = $619,850]; + [for Rule 17Ad–22(b)(4) ((Assistant General Counsel for 87 hours at $430 per hour) + (Compliance Attorney for 77 hours at $320 per hour) + (Computer Operations Department Manager for 23 hours at $367 per hour) + (Senior Business Analyst for 23 hours at $232 per hour) = $75,827 × 9 respondents = $682,443) + ((Chief Compliance Officer for 40 hours at $423 per hour) + (Computer Department Operations Manager for 40 hours at $367 per hour) + (Senior Programmer for 20 hours at $304 per hour) = $37,680 × 9 respondents = $339,120) = $1,021,563]; + [for Rules 17Ad–22(b)(5)–(7) (Assistant General Counsel for 87 hours at $430 per hour) + (Compliance Attorney for 77 hours at $320 per hour) + (Computer Operations Department Manager for 23 hours at $367 per hour) + (Senior Business Analyst for 23 hours at $232 per hour)) = $75,827 × 9 respondents = $682,443]; + [for Rule 17Ad–22(c) ((Assistant General Counsel for 60 hours at $430 per hour) + (Compliance Attorney for 85 hours at $320 per hour) + (Computer Operations Department Manager for 23 hours at $367 per hour) + (Senior Business Analyst for 23 hours at $232 per hour) = $66,777 × 10 respondents = $667,770) + ((Chief Compliance Officer for 40 hours at $423 per hour) + (Computer Department Operations Manager for 40 hours at $367 per hour) + (Senior Programmer for 20 hours at $304 per hour) = $37,680 × 10 respondents = $376,800) = $1,044,570] + [for Rule 17Ad–22(c)(2) (Senior Accountant for 500 hours at $198 per hour) × 4 respondents = $396,000] = $3,764,426.

[564] The total ongoing cost was calculated as follows: [for Rules 17Ad–22(b)(1)–(3) and (d)(1)–(15) (Compliance Attorney for 60 hours at $320 per hour = $19,200 × 10 respondents = $192,000)]; + [for Rule 17Ad–22(b)(4) ((Compliance Attorney for 60 hours at $320 per hour = $19,200 × 9 respondents = $172,800) + (2 Independent Consultants for 30 hours per week at $600 per hour = $36,000 per week × 12 weeks = $432,000 × 9 respondents = $3,888,000) = $4,060,800]; + [for Rules 17Ad–22(b)(5)–(7) (Compliance Attorney for 60 hours at $320 per hour = $19,200 × 9 respondents = $172,800]; + [for Rule 17Ad–22(c) (Compliance Attorney for 60 hours at $320 per hour = $19,200 × 10 respondents = $192,000)]; [for Rule 17Ad–22(c)(1) (Compliance Attorney for 1 hour at $320 per hour) + (Computer Operations Department Manager for 2 hours at $367) = $1,054 per quarter × 4 quarters per year = $4,216 per year × 9 respondents = $37,944]; [for Rule 17Ad–22(c)(2) (Senior Accountant for 250 hours at $198 per hour) × 10 respondents = $495,000) + (Independent Audit Fee = $500,000 per year × 10 respondents = $5,000,000)] = $10,150,544.

costs of the rulemaking is provided below.

Many parts of Rule 17Ad–22 are consistent with current practice and therefore should not impose significant costs on registered clearing agencies to comply with those provisions. As noted above, Rule 17Ad–22 also will have the benefit of augmenting the Commission's ability to regulate clearing agencies. Rule 17Ad–22 should improve access to security-based swap clearing agencies. The extent to which security-based swap participants that will be eligible under new access requirements choose to become members is unknown and we are unaware of empirical data on the potential impact that this will have on competition in the security-based swap market. Therefore, the quantification of this benefit is not feasible.

3. Definitions (Rules 17Ad–22(a)(1)–(5))

a. Rule 17Ad–22(a)(1)

Rule 17Ad–22(a)(1) would define ''central counterparty'' as a clearing agency that interposes itself between counterparties to securities transactions to act functionally as the buyer to every seller and as the seller to every buyer. The definition contained in this rule is generally consistent with the common usage and understanding of that term.[565] The costs and benefits associated with the impacts of the definition are incorporated in the discussion below related to the costs and benefits of the provisions where the definition is used.

b. Rules 17Ad–22(a)(2) and (5)

Rule 17Ad–22(a)(2) would define ''central securities depository services'' to mean services of a clearing agency that is a securities depository as described in Section 3(a)(23) of the Exchange Act.[566] Rule 17Ad–22(a)(5) would define ''net capital,'' for the limited purpose of Rule 17Ad–22(b)(7), to have the same meaning as set forth in Rule 15c3–1 under the Exchange Act for broker-dealers or any similar risk adjusted capital calculation for all other prospective clearing members.[567] The costs and benefits associated with the impacts of the definition are incorporated in the discussion below related to the costs and benefits of the provisions where the definition is used.

c. Rule 17Ad–22(a)(3)

Rule 17Ad–22(a)(3) would define ''participant family,'' for the limited purposes of Rules 17Ad–22(b)(3) and 17Ad–22(d)(14), to mean that if a participant controls another participant, or is under common control with another participant, then the affiliated participants shall be collectively deemed to be a single participant. The Commission is not narrowing the definition of control in this context to mean ownership of 50% or more of the voting securities or other interests in a participant, as requested by one commenter.[568] We believe the more appropriate evaluation of control is based on the relation between the entities and the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. In conducting this evaluation, clearing agencies should also be guided by the definition of ''control'' set forth in Rule 405 under the Exchange Act, using the information available to them. The costs and benefits associated with the impacts of the definition are incorporated in the discussion below related to the costs and benefits of the provisions where the definition is used.

d. Rule 17Ad–22(a)(4)

Rule 17Ad–22(a)(4) would define ''normal market conditions'' for the limited purposes of Rules 17Ad–22(b)(1) and (2), to mean conditions in which the expected movement of the price of cleared securities would produce changes in a clearing agency's exposures to its participants that would be expected to breach margin requirements or other risk control mechanisms only one percent of the time.[569]

The rule conforms to the generally recognized standard of ''normal market conditions'' as defined in the RCCP and is the benchmark for most CCPs' margin methodologies, many of which use risk-based models to ensure coverage at a 99% confidence interval, at minimum, over a designated time horizon.[570] The standard also comports with the international standard for bank capital requirements established by the Bank for International Settlements, which requires banks to measure market risks at a 99% confidence interval when determining regulatory capital requirements.[571] The costs and benefits associated with the impacts of the definition are incorporated in the discussion below related to the costs and benefits of the provisions where the definition is used.

4. Risk Management Requirements for CCPs (Rules 17Ad–22(b)(1)–(4))

Rules 17Ad–22(b)(1)–(4) concern risk management requirements for clearing agencies that perform CCP services. In particular, these rules will require a clearing agency that provides CCP services to have written policies and procedures reasonably designed to: measure its credit exposures at least once a day, use margin requirements to limit its exposures to potential losses from defaults by its participants, use risk-based models and parameters to set margin requirements and to review such requirements at least monthly, maintain sufficient financial resources to withstand a default by the two participant families, if clearing security-based swaps, or one participant family otherwise, to which it has the largest exposure,[572] and provide for an annual model validation process.

As described above, these rules are consistent with current practice. Registered clearing agencies already have written policies and procedures designed to meet these risk management requirements, particularly Rules 17Ad–22(b)(1)–(3). While Rules 17Ad–22(b)(1)–(3) reflect the CPSS–IOSCO Recommendations, which are observed by all clearing agencies, Rule 17Ad–22(b)(4) would establish certain new minimum practices for clearing agencies.

- First, Rule 17Ad–22(b)(1) requires that each CCP measure its credit exposures at least once per day. This rule codifies the current minimum baseline adhered to by the two clearing

[565] *See RCCP, supra* note 33, Annex 5: Glossary.

[566] ''[Clearing agency] also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.'' 15 U.S.C. 78c(a)(23).

[567] As appropriate, the clearing agency may develop risk adjusted capital calculations for prospective clearing members that are not broker-dealers.

[568] *See supra* note 107 and accompanying text.

[569] The definition of normal market conditions in Rule 17Ad–22(a)(4) is consistent with the corresponding explanation established in the CPSS–IOSCO Recommendations. *See RCCP, supra* note 33, at 21 (explanatory note number 1).

[570] *See RCCP, supra* note 33, Annex 5: Glossary. *See also supra* discussion on 99% confidence interval as an accepted standard for measuring market risk in Section II.B.2.b and discussion of current industry baselines in Section V.B.

[571] *See* Bank for International Settlements' Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (June 2004), *available at http://www.bis.org/publ/bcbs107.pdf; see also* Darryll Hendricks and Beverly Hirtle, *New Capital Rule Signals Supervisory Shift, available at http://www.bis.org/bcbs/ca/alrequse98.pdf. See also supra* notes 526–529 and accompanying text.

[572] *See* Rule 17Ad–22(a)(3), *supra* Section III.B.3 (defining ''participant family'' for purposes of proposed Rule 17Ad–22(b)(3)).

agencies presently registered with the Commission that provide CCP services.

• Second, Rule 17Ad–22(b)(2) requires that each CCP collect margin from its participants to limit exposures resulting from changes in prices or participant positions in current market conditions. This margin can also be used to minimize the CCPs losses in the event of a participant default. This rule is consistent with the current practice of each CCP to calculate daily margin requirements using risk-based models to ensure coverage at a 99% confidence interval (*i.e.,* under ''normal market conditions''), at minimum, over a designated time-horizon.

• Third, and consistent with Rule 17Ad–22(b)(3), each CCP currently maintains sufficient financial resources to withstand, at a minimum, a default by the participant to which it has the largest exposure in extreme but plausible market conditions.[573] In addition, both registered CCPs clearing security-based swap transactions maintain additional financial resources sufficient to withstand the simultaneous default by the two participant families to which the CCPs have the largest exposures.

• Fourth, Rule 17Ad–22(b)(4) would ensure that all CCPs have annual model validations performed by a qualified person who is free from influence from the persons responsible for development or operation of the models being validated.

While not requiring major changes to existing operational practices and policies and procedures currently in place at most registered clearing agencies, Rules 17Ad–22(b)(1)–(4) provide enforceability to minimum standards regarding how clearing agencies manage counterparty credit and default risks. One of the primary roles of a CCP is to mitigate counterparty credit and default risk. Because of the role margin plays in a default, a CCP must have confidence that the liquidation value of available margin will be sufficient to cover amounts owed by a defaulting participant to the clearing agency, and that the margin will be available for liquidation without delay. As described in the baseline discussion,[574] CCPs have mechanisms and procedures in place to measure credit exposure. To effectively mitigate counterparty credit risk, a CCP must have accurate and timely measurements of its credit exposures to each of its counterparties, and must impose adequate margin requirements determined by risk-based models and parameters. CCPs may be faced with significant and rapid changes in counterparty credit exposures.

Frequent measurement of counterparty credit exposures and the use of validated risk-based modeling are essential to setting adequate margin requirements. A good margin setting methodology will help avoid both under- and over-collateralization. Under-collateralization exposes a CCP to increased credit risk in the event of a participant default, as the CCP may be unable to recover amounts owed to it from the participant on an unsecured basis. Incurring losses on a counterparty default could disrupt the operations of the clearing agency as well as its non-defaulting participants by exposing them to unanticipated liabilities. These disruptions could negatively impact price efficiency and capital formation if distressed liquidations result in prices away from fundamental values for significant periods of time. Over-collateralization imposes unnecessary costs on trading by tying up clearing member assets that could otherwise be used more efficiently, harming allocative efficiency and capital formation. The Commission believes that Rules 17Ad–22(b)(1)–(4) creates standards to mitigate a CCP's risks associated with counterparty credit exposures and defaults.

Rules 17Ad–22(b)(1)–(4) acknowledge that appropriate risk management will vary based on a number of factors relating to the markets and products a CCP serves. Subject to minimum standards, the rules permit each clearing agency the flexibility to develop the most effective and economically efficient risk measurement and risk-based modeling approaches for each of its unique markets and products to achieve an optimal level of risk mitigation. By setting only a minimum standard, the rules also allow each CCP to adapt its risk management strategies as needed in response to dynamic market conditions rather than locking the CCP into a fixed set of risk mitigation rules. The minimum standards also prevent a CCP from establishing risk monitoring procedures below a baseline in an effort to reduce costs and gain a competitive advantage.

The Commission believes that credit exposures should be measured at least once a day because a clearing agency that did not do so would not be able to effectively manage its risk. However, the Commission believes that it cannot reasonably determine the most appropriate frequency for CCPs to monitor their risk exposures in all circumstances. The minimum standards in Rules 17Ad–22(b)(1)–(4) are intentionally written to comply with CPSS–IOSCO Recommendations and limit systemic risk while not precluding entry to potential new entrant CCPs. Each CCP is exposed to participants in different markets characterized by different trading patterns, volumes, liquidity, transparency and other unique market characteristics. Rules 17Ad–22(b)(1)–(4) provide each CCP the flexibility to tailor its risk management practices to each of its unique markets and products, allowing it to develop the most economically efficient and effective risk mitigation strategies possible.

The Commission considered the range of practices at registered clearing agencies with respect to monitoring risk exposures and recognizes that there is a risk that by setting the minimum standards according to the highest level of current market practice, the standards could be too high for some potential market conditions or future security types. This could result in sub-optimal risk management practices for a period in the future to the extent such factors are not appropriately recognized by the Commission.

The Commission believes it is appropriate that CCPs clearing security-based swaps are held to the higher minimum standard in Rule 17Ad–22(b)(3) than CCPs that do not clear security-based swaps. In particular, the Commission believes that the requirement to maintain at a minimum financial resources capable of withstanding the default of its two largest participant families as opposed to only its largest participant family is at this time appropriate for clearing security-based swaps but not for other securities because of the unique and heightened risks posed by credit default swaps relative to traditional securities. Credit default swaps pose additional risk management challenges in that their value can change by a large amount in an extremely short time interval (*i.e.,* they are subject to significant jump-to-default risk).[575] Unlike many equity and fixed income securities, but similar to other derivative contracts, a CCP's obligation when clearing credit default swaps does not end when the transaction settles, but at its expiration. In addition, unlike other products that also exhibit these characteristics, credit default swaps are unique in their size relative to their underlying markets. Recent research shows that notional outstanding in credit default swaps are often close to or greater than the

[573] *See, e.g., supra* notes 168 and 183.

[574] *See supra* Section V.B.2.a.

[575] See *supra* note 162.

outstanding value of the underlying instruments.[576]

Several other factors also complicate risk modeling for credit default swaps. CCPs have only recently introduced clearing for security-based swaps, so the risk models used by CCPs have not yet been stressed by a substantial range of market conditions. In addition, many security-based swaps are relatively illiquid, which complicates the default management process. For example, more than 98% of single-name credit default swap reference entities trade less than 10 times per day.[577] Low liquidity typically leads to wider bid-ask spreads, greater price impact of trades, and potentially higher costs when finding replacements for defaulted positions.

The Commission recognizes that requiring a different standard for CCPs for security-based swaps could discourage new entrants from entering into the market for these instruments because of higher financial resource requirements relative to other types of instruments. In particular, the higher the financial resource requirements, the higher the costs to establish a new clearing agency, potentially resulting in fewer clearing agencies.

While the Commission is sensitive to the consequences of establishing a different standard for CCPs for security-based swaps, the Commission believes that the financial resources of a CCP must be robust enough to accommodate the risks that are particular to each market served—irrespective of whether such analysis results in different standards. As described above, the Commission believes that Rule 17Ad–22(b)(3) does not represent a change in practice for any CCP that currently clears credit default swaps, and to the extent that it represents an increased financial resources requirement for potential competitors, this increased burden is justified by the greater difficulty of risk-management in credit default swaps as opposed to traditional securities.[578] Furthermore, the Commission believes that the burdens associated with this provision are minimized as the rule permits registered CCPs to comply with the ''cover two'' requirement by establishing a separate fund and related procedures for their security-based swap operations if they prefer this structure to the application of the ''cover two'' requirement to the entire legal entity. As security-based swap products with different characteristics are proposed for clearing over time, the Commission would evaluate risk profiles of such products to consider how they would be treated under the ''cover two'' standard.

The Commission further recognizes the benefits associated with establishing financial resource requirements that are consistent with the international standards, such as the benefit of reduced incentives for regulatory arbitrage. The Commission notes that the ''cover two'' requirement for security-based swaps CCPs is consistent with the financial resource requirements for CCPs contained in the FMI Report[579] and in EMIR.

The Commission believes it is important to codify the practice of obtaining an annual model validation to ensure that a CCP can evaluate the continued appropriateness of its margin models. Rule 17Ad–22(b)(4) also should help CCPs better evaluate their margin models, which should promote greater confidence in clearing agencies' risk management practices.

The Commission is also mindful of the costs associated with the final rule. In particular, the Commission recognizes that though many parts of Rule 17Ad–22 being adopted by the Commission today are a codification of usual and customary practices at CCPs and clearing agencies, they may still impose costs.

As noted above, the standards contained in Rule 17Ad–22(b)(1)–(4) would impose certain burdens and related costs on respondent clearing agencies. As discussed in Section IV.C, based on policies and procedures requirements for Regulation NMS, and based on staff conversations with industry representatives, the Commission has estimated the burdens and related costs of these requirements for clearing agencies.

The clearing agency standards in Rules 17Ad–22(b)(1)–(4) may require respondent clearing agencies to review and amend their policies and procedures. The standards contained in Rule 17Ad–22(b)(4) also would impose one-time costs on clearing agencies to create policies and procedures as well as require one-time systems adjustments related to the capability to perform an annual model validation. The costs of creating these policies are included in the $3.7 million startup cost estimates discussed earlier.

The standards contained in Rules 17Ad–22(b)(1)–(3) also would impose ongoing costs on clearing agencies such as monitoring and enforcement activities with respect to the policies and procedures the registered clearing agency creates in response to the standards. The ongoing costs of these monitoring and enforcement activities are included in the estimated $10.1 million annual costs discussed earlier.[580] These Rules may also impose additional incremental costs related to, for example, employee training, systems testing, and other operational considerations designed to ensure both initial and continued compliance with such policies and procedures.

The standards contained in Rule 17Ad–22(b)(4) would also impose ongoing costs on clearing agencies. For example, the clearing agency standards in Rule 17Ad–22(b)(4) would collectively require respondent CCPs to perform certain ongoing monitoring and enforcement activities with respect to the policies and procedures the clearing agency creates in response to the standard and to provide for an annual model validation. The Commission believes clearing agencies would hire a consulting firm[581] that dedicates two consultants to the project. The costs for the consultants are included in the $10.1 million annual paperwork cost discussed earlier. Rule 17Ad–22(b)(4) may also impose additional incremental costs associated with employee training, systems testing, and other operational considerations designed to ensure initial and continued compliance with the clearing agencies model validation policies and procedures.

Except as noted above, Rules 17Ad–22(b)(1)–(4) establish standards that are already largely adhered to in practice by each CCP registered with the Commission. Thus, while Rules 17Ad–22(b)(1)–(4) will require each currently registered CCP to continue the

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[576] *See supra* note 163.

[577] *See* Memorandum by the Commission's Division of Risk, Strategy, and Financial Innovation, Security-Based Swap Block Trade Definition Analysis (Jan. 13, 2011), *available at http://www.sec.gov/comments/s7-34-10/s73410-12.pdf. See also* Che Sidanius and Anne Wetherilt, *Thoughts on Determining Central Clearing Eligibility of OTC Derivatives,* (Bank of England, Financial Stability Paper, No. 14, Mar. 2012), *available at http://www.bankofengland.co.uk/publications/Documents/fsr/fs_paper14.pdf.* The authors report that in the six months ending February 2012, 90% of their sample of 1,000 single name CDS contracts trade an average of less than 50 times per week.

[578] *See* CFTC–SEC Staff Roundtable on Clearing of Credit Default Swaps (Oct. 2010), at 123, *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission7_102210-transcrip.pdf* (Stan Ivanov, ICE Clear Credit stating ''at ICE we look at two simultaneous defaults of the two biggest losers upon extreme conditions * * *'').

[579] *See FMI Report,* Principles 4 and 7, *supra* note 32.

[580] This number also reflects the costs of Rules 17Ad–22(d)(1)–(15).

[581] Currently, the majority of the clearing agencies performing model validation employ a consulting firm; the remainder of the clearing agencies have created an internal model validation group that does not report to the person overseeing the development or operation of the models.

expenditures associated with maintaining current rules, policies, and procedures, they should impose limited incremental costs.

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rules 17Ad–22(b)(1)–(4), as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. Although the Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release, several commenters raised concerns, which are discussed above in Section III.C.1.b, that have a bearing on the costs and benefits associated with the rule. In response to these comments, the Commission carefully considered alternatives to the approach we are adopting in Rule 17Ad–22, including more prescriptive alternatives (*e.g.,* specifying how many times a day a clearing agency should measure its credit exposures to its participants). However, as noted above, clearing agencies match the frequency of credit exposure calculations to the horizon of the guarantee they provide. The requirement to measure credit exposure at least once per day does not preclude more frequent measurement of credit exposure, allowing those who guarantee intraday to measure exposures intraday. Therefore, the Commission believes the flexibility provided by Rules 17Ad–22(b)(1) and (2) appropriately reflects differences in clearing agency models.

The Commission also considered alternatives to Rule 17Ad–22(b)(3), such as (1) requiring each clearing agency, regardless of the securities cleared, to maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions, and (2) requiring each clearing agency, regardless of the securities cleared, to maintain sufficient financial resources to withstand, at a minimum, a default by the two participant families to which it has the largest exposure in extreme but plausible market conditions. The Commission decided to create separate standards for the two different kinds of CCPs because it believes that clearing security-based swaps is inherently riskier than clearing other types of securities, as discussed above.

Furthermore, the Commission considered a number of alternatives to provisions in Rule 17Ad–22(b)(4). For example, one alternative was to be more prescriptive in identifying who could perform the annual model validations. The Commission recognizes there is a tradeoff between the need for expertise in conducting model validations and the independence of the validator. Therefore, Rule 17Ad–22(b)(4) sets a principle that allows the clearing agencies to balance this trade-off in a way that satisfies the purpose of the validation. The Commission also considered alternatives, which would have required that model validations occur more or less frequently than annually. The Commission believes that requiring model validation at least annually is appropriate because it complies with CPSS–IOSCO Recommendations and clearing agencies have economic incentives to evaluate their models more frequently if market conditions change, whether or not they are required to do so by Commission rules.

5. Participant Access Standards for CCPs (Rules 17Ad(b)(5)–(7))

These rules establish requirements for policies and procedures detailing membership practices. Although we believe that these rules reflect current practices for some CCPs, they may require a change in practice for others. Specifically, Rules 17Ad–22(b)(5), (6) and (7) would introduce certain requirements regarding access to CCPs, including that each CCP must: (1) Provide the opportunity for a person who does not perform any dealer or security-based swap dealer services to obtain membership; (2) preclude the use of minimum portfolio size thresholds and minimum transaction volume thresholds as conditions to membership; and (3) provide the ability to obtain membership to persons who maintain net capital equal to or greater than $50 million.

The Commission is adopting Rules 17Ad–22(b)(5), (6) and (7) to establish a regulatory framework for registered CCPs regarding membership practices. These rules also address concerns about access to central clearing in light of the proposed implementation of mandatory clearing requirements around the world.[582] The Commission believes that Rules 17Ad–22(b)(5), (6) and (7) will complement Section 17A of the Exchange Act, which requires that a clearing agency shall not be registered unless the Commission determines, among other things, that the clearing agency's rules do not impose burdens on competition that are unnecessary or inappropriate to promote the purposes of the Exchange Act[583] and that the rules are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency.[584]

As described above, CCPs for securities other than security-based swaps generally do not engage in the practices that Rules 17Ad–22(b)(5), (6), and (7) are designed to prevent. However, CCPs for security-based swaps have required members to have a minimum portfolio size (*e.g.,* $1 trillion outstanding) or minimum trading volume, meet very high minimum capital requirements (*e.g.,* $5 billion), and require members to operate a dealer business. Rule 17Ad–22 is designed to prohibit these types of practices by all CCPs, irrespective of the types of products cleared, by establishing a minimum standard that would have the benefit of uniformity for currently registered CCPs and any future market entrants.

CCPs have membership requirements so that the CCPs and their members can limit their exposures to less creditworthy market participants. However, as noted above, members may have the incentive to promote membership requirements that limit access to the CCP for competitive reasons. While such requirements have to date been adopted only by CCPs that engage in the clearance and settlement of credit default swaps, the Commission believes that preventing the introduction of such requirements also may be an important consideration for CCPs that clear other instruments.[585] If a clearing agency clears both security-based swaps and other securities, Rule 17Ad–22(b)(6) will prohibit the clearing agency from denying membership solely because the applicant did not maintain a minimum portfolio size or minimum volume in security-based swap transactions. The rule is being applied to all clearing agencies, regardless of the type of instrument cleared, so that an existing or future clearing agency could not use its market power to exclude potential applicants for the benefit of its existing members or unnecessarily restrict access to central clearing. Indeed, the concerns noted above about the incentives to control access to CCPs could apply to the clearing of any security. Accordingly, all CCPs, regardless of the type of security, will be subject to Rules 17Ad–22(b)(5), (6), and (7).

The Commission believes that no registered CCP should deny

[582] *See, e.g., CFTC–SEC Staff Roundtable on Clearing of Credit Default Swaps* (Oct. 2010), *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission7_102210-transcrip.pdf.*

[583] 15 U.S.C. 78q–1(b)(3)(F).

[584] 15 U.S.C. 78q–1(b)(3)(G).

[585] *See supra* Section V.B.2.b and note 547.

membership solely because a person does not perform any dealer or security-based swap dealer services or based on a minimum portfolio size or minimum transaction volume thresholds. The Commission does not believe that these factors are, by themselves, appropriate indicators of whether an applicant should be admitted to membership in a clearing agency. The Commission is adopting Rule 17Ad–22(b)(5) to help to foster the development of correspondent clearing arrangements that will allow market participants that are not dealers or security-based swap dealers to obtain access to a CCP, which should have the beneficial result of greater competition in and access to central clearing because these persons do not execute securities trades for their own account. Instead, they provide correspondent clearing services for market participants.[586] As a result, their ability to provide correspondent clearing services would tend to increase as competition and transaction volumes increased. The Commission further believes that imposing minimum thresholds on the size or transaction volume of a participant's portfolio would not function as a good indicator of whether the participant is able to meet its obligations to a clearing agency.[587] New participants in a CCP that do not initially intend to or have the capacity to transact in substantial size or volume may nevertheless have the operational and financial capacity to perform the activities that other participants are able to perform but at lower size or volume levels. Accordingly, the Commission believes that Rule 17Ad–22(b)(6) will help facilitate the requirement in Section 17A of the Exchange Act that the rules of a clearing agency must permit fair and open access to qualified participants.

Rule 17Ad–22(b)(7) will significantly increase access to clearing membership in CCPs that clear credit default swaps while still allowing CCPs to maintain what the Commission believes will be sufficient net capital standards for members. For example, the rule establishes a minimum net capital requirement of $50 million that only approximately 201 broker-dealers, or four percent of the total number of registered broker-dealers, can satisfy today according to broker-dealer data available to the Commission. A net capital threshold of $100 million would reduce the number of broker-dealers that could meet the standard by 73 (36%) to 128 eligible firms, while a further reduction of the net capital requirement to $25 million would increase the number of eligible broker-dealer firms by 86 (42%) to 287 (6% of all registered broker-dealers).[588] The Commission believes that firms that maintain a net capital level of at least $50 million have sufficient financial resources to participate at some level in a CCP, provided that they are able to comply with other reasonable membership standards, and that the increase in the potential pool of clearing members is consistent with the Commission's intention of expanding access to clearing.

The Commission carefully considered the tradeoffs of selecting a lower or higher net capital threshold. A higher net capital requirement may permit CCPs to exercise market power for the benefit of members by limiting membership to an unduly small group of firms.[589] This could limit competition in the market for supplying dealer services as dealers who are CCP members would have an advantage over other dealers. It could also increase overall systemic risk by concentrating the counterparty risk in relatively few participants. A less restrictive capital requirement may also result in incentives for firms that are not capable of participating in the default management process of a CPP to effectively ''free ride'' on the default services provided by the rest of the membership.[590] The Commission believes that the $50 million capital requirement appropriately balances these concerns and bridges the differences in current membership standards across registered clearing agencies. At the same time, the Commission notes that having a $50 million capital level does not create a right to membership.

In addition, we note that the $50 million requirement is the same as the CFTC's capital requirement for DCO membership.[591] Establishing a different requirement than that adopted by the CFTC could create opportunities for regulatory arbitrage and would in effect make one regulator's standard irrelevant for dually registered clearing agencies like CME, ICE Clear Credit and OCC. Furthermore, some of these competing concerns are addressed by the flexibility contemplated by Rule 17Ad–22(b)(7), as it permits each clearing agency to develop scalable policies and procedures to limit the activities of participants based on their level of net capital.[592] For example, a clearing agency can place limits on its potential exposure to participants operating at certain net capital thresholds by restricting the maximum size of the portfolio such participants are permitted to maintain at the clearing agency. The Commission also believes that Rule 17Ad–22(b)(7) would facilitate sound risk management practices by encouraging clearing agencies to examine and articulate the benefits of higher net capital requirements as a result of having clearing agencies develop scalable membership standards that link the nature and degree of participation with the potential risks posed by the participant.[593]

The Commission believes that Rules 17Ad–22(b)(5), (6) and (7) will create the potential for greater access to clearing services for, and opportunities for competition among market participants, particularly for credit default swaps. The Commission believes that greater access to clearing should benefit market participants by allowing them to provide equivalent access to CCP clearing services for security-based swaps to their customers. Doing so should increase opportunities for competition among clearing firms on both price and service which should, in turn, reduce costs to the ultimate customers for the financial services being offered.

Rules 17Ad–22(b)(5), (6) and (7) may impose some costs on clearing agencies due to the increased complexity of the policies and procedures regulating access to the clearing agency. The Commission acknowledges that lowering membership standards to increase the number of participants may increase the likelihood of a participant default. Nevertheless, broadening direct access will tend to reduce the concentration of risk in any individual

[586] *See supra* note 235.

[587] Proposed Rule 17Ad–22(b)(6) would not prohibit a clearing agency from imposing *maximum* portfolio sizes or transaction volume amounts.

[588] As stated above, the $50 million net capital requirement affects access to CCPs that clear CDS. The Commission recognizes that the number of dealers that clear CDS is significantly smaller than the total number of broker-dealers, and that even if Proposed Rule 17Ad–22(b)(7) is successful in encouraging the broadening of membership in CCPs that clear CDS, the Commission believes the number of broker-dealers newly eligible for clearing membership that become clearing members as a result of this change is likely to be substantially less than 201.

[589] *See* Craig Pirrong, *The Economics of Central Clearing: Theory and Practice* (ISDA Discussion Papers Series, No. 1, May 2011), at 28.

[590] *See id.* at 28.

[591] *See supra* note 38.

[592] The Commission notes that some clearing agencies currently utilize capital-related requirements that differentiate among types of participants. For instance, FICC has maintained a $50 million net worth requirement and $10 million excess net capital requirement for its Category 1 Dealer Netting Members and a $25 million net worth requirement and $10 million excess net capital requirement for its Category 2 Dealer Netting Members.

[593] *See supra* note 264.

direct clearing member. Further, while Rules 17Ad–22(b)(5), (6) and (7) prohibit certain barriers to entry, these provisions nevertheless still provide clearing agencies with the flexibility to develop membership standards that maintain a robust risk management framework.

Typically, dealers innovate and customize in new financial contracts to address specific risk-management problems of their clients. It is not uncommon for these contracts to become exchange-traded, as the market for the product matures. Dealers, however, may have an incentive to maintain wider bid-ask spreads associated with a customized contract relative to the spreads that might apply if it were a standardized product. Greater access to a CCP could promote greater standardization because all CCP members could submit transactions to the CCP based on the CCP's pre-established rules. Accordingly, the Commission believes that expanded membership will promote the natural evolution of customized contracts to standardized contracts with deeper liquidity and reduced bid-asked spreads.

In terms of comments received, one commenter believed that the proposed rules are unnecessary and pointed to the existing requirement in Section 17A(b)(3)(F) of the Exchange Act that a clearing agency shall not be registered unless the Commission determines that the clearing agency's rules are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency. The Commission believes Rules 17Ad–22(b)(5)–(7) will guide registered CCPs to practices that support the requirement to provide fair and open access.

The Commission is mindful of the costs associated with the final rules. In particular, the Commission recognizes that creating new policies and procedures can impose costs even if those policies and procedures largely codify current practice.

As noted above, the standards contained in Rules 17Ad–22(b)(5)–(7) would impose certain burdens and related costs on respondent clearing agencies. As discussed in Section IV.C.3, based on policies and procedures requirements for Regulation NMS, and based on staff conversations with industry representatives, the Commission has estimated the burdens and related costs of these requirements for clearing agencies.

The clearing agency standards in Rules 17Ad–22(b)(5)–(7) would require respondent clearing agencies to create policies and procedures. The standards contained in Rules 17Ad–22(b)(5)–(7) would also impose ongoing costs on clearing agencies. For example, the clearing agency standards in Rules 17Ad–22(b)(5)–(7) would collectively require respondent clearing agencies to perform certain ongoing monitoring and enforcement activities with respect to the policies and procedures the clearing agency creates in response to the standard. The costs of creating these policies and procedures, and performing ongoing monitoring and enforcement activities were included, respectively, in the $3.7 million startup costs and $10.1 million annual ongoing costs discussed earlier. These provisions may also impose incremental costs related to, for example, employee training, systems testing, and other operational considerations designed to ensure both initial and continued compliance with the clearing agency's participant access policies and procedures.

6. Record of Financial Resources and Annual Audited Financial Statements (Rules 17Ad–22(c)(1)–(2))

Rule 17Ad–22(c)(1) provides that each fiscal quarter (based on calculations made as of the last business day of the clearing agency's fiscal quarter), or at any time upon Commission request, a CCP shall calculate and maintain a record [594] of the financial resources necessary to meet its requirement in proposed Rule 17Ad–22(b)(3) and sufficient documentation to explain the methodology it uses to compute such financial resource requirement.

Rule 17Ad–22(c)(2) requires a clearing agency, within 60 days after the end of its fiscal year, to post on its Web site annual audited financial statements. Such financial statements shall: (i) Include, for the clearing agency and its subsidiaries, consolidated balance sheets as of the end of the two most recent fiscal years and statements of income, changes in stockholders' equity and other comprehensive income [595] and cash flows for each of the two most recent fiscal years; (ii) be prepared in accordance with U.S. GAAP, except that for a clearing agency that is a corporation or other organization incorporated or organized under the laws of any foreign country the consolidated [596] financial statements may be prepared in accordance with U.S. GAAP or IFRS; (iii) be audited in accordance with standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01); and (iv) include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02).

Rule 17Ad–22(c)(1) is, for the most part, identical to what is described in the baseline section above, and thus, this rule will, for the most part, codify an existing practice of clearing agencies. The difference is that CCPs will now have to format and synthesize existing information in a manner sufficient to explain the methodology the clearing agency uses to meet the requirement of Rule 17Ad–22(b)(3).

In addition, Rule 17Ad–22(c)(2) is substantially similar to what is described in the baseline section above. Most clearing agencies report financial statements in accordance with Rule 17Ad–22(c)(2) with one exception.[597] Accordingly, Rule 17Ad–22(c)(2) is largely consistent with current practice and will impose minimal costs on registered clearing agencies.[598]

As described above, these two rules, except where noted above, codify current practice. To the extent that current practice is not currently required by rule, the rules being adopted today allow for greater enforceability of these disclosure practices, and as a result ensure that CCPs continue to maintain an environment of transparency.

Rule 17Ad–22(c)(1) ensures that the Commission continues to be able to monitor whether CCPs maintain the financial resources necessary to meet its requirement in proposed Rule 17Ad–22(b)(3). The requirement that CCPs will have to format and synthesize existing information in a manner sufficient to explain the methodology the clearing agency uses to meet the requirement of Rule 17Ad–22(c)(1), facilitates the

[594] *See* Exchange Act Rule 17a–1 (17 CFR 240.17a–1). Clearing agencies may destroy or otherwise dispose of records at the end of five years consistent with Exchange Act Rule 17a–6 (17 CFR 240.17a–6).

[595] The added language, ''changes in stockholders' equity and other comprehensive income,'' does not change the substance of the rule as provided in the Proposing Release. This language has been added in the final rule to clarify the scope of what is meant by complete set of financial statements consistent with customary industry accounting practices.

[596] The ''consolidation'' language does not change the substance of the rule as provided in the Proposing Release, but has been added to clarify that the financial statements requirement pertains to that of the clearing agencies and its subsidiaries on a consolidated basis.

[597] *See supra* note 549.

[598] Because BSECC and SCCP conduct no operations, we also expect their respective costs to be minimal.

Commission's access to this information in a format that is clear and understandable, and ensures that the Commission can obtain sufficient documentation to understand and evaluate the methodology used by the CCP to compute such financial resource requirement.

Rule 17Ad–22(c)(2) ensures that CCPs continue to provide transparency to regulators and market participants. Transparency helps to ensure that market participants in general have better information about the stability of the system, and facilitates monitoring by the Commission and other regulators, clearing members, investors, academics and the public in general. Further, to the extent that CCPs are systemically important institutions, regulators may also be monitoring systemic risk when monitoring CCPs.

Transparency is particularly important to clearing members, whose capital is at risk if a clearing member fails. Clearing members can use the information codified in this rule to assess risks related to their participation in the CCP and manage those risks. The information codified in this rule can also be used by clearing members in a way that promotes competition. In situations where multiple CCPs clear the same product, clearing members may base their decision on which CCP to use on the financial information codified in Rule 17Ad–22(c)(2), which requires that CCPs make their financial information available to the public, even during times of market stress. It is possible that if the financial position of the CCP deteriorates, clearing members and investors may discontinue membership in or otherwise limit their use of that CCP, therefore driving CCPs with substandard risk management practices out of business.

The Commission carefully considered alternatives to these provisions. For example, an alternative to the requirements of Rule 17Ad–22(c)(2) would be to permit registered clearing agencies to post audited financial statements prepared in accordance with the laws of their country of origin, reconciled to U.S. GAAP. Indeed, one registered clearing agency, ICE Clear Europe, currently posts on its Web site audited financial statements prepared according to UK GAAP. Having foreign CCPs prepare financial statements using more widely applied bases of accounting such as U.S. GAAP or IFRS may offer greater utility to market participants, regulators and other stakeholders of clearing agencies. Therefore, we have limited the different bases of accounting upon which the annual audited consolidated financial statements may be prepared to IFRS and U.S. GAAP. The Commission recognizes that there are costs associated with requiring that a registered CCP comply with these reporting standards. However, to the extent that the parent company of ICE Clear Europe already prepares financial statements according to U.S. GAAP, we expect the costs of this requirement to be less burdensome. The Commission also believes that allowing CCPs to prepare financial statements in accordance with the laws of their countries of origin and then reconcile the differences to U.S. GAAP would add complexity associated with the reconciliation that may offer less utility to market participants, regulators and other stakeholders of clearing agencies because of the burden of understanding and interpreting additional bases of accounting would create for users.

The Commission is mindful of the costs associated with the final rule. The exact nature of the procedures a clearing agency will establish to support this requirement is likely to vary between clearing agencies. Nevertheless, clearing agencies already make this type of information available to the Commission and/or on their Web sites. Therefore, the incremental cost of this Rule is unlikely to be significant.

As noted above, the standards contained in Rules 17Ad–22 (c)(1) and (2), would impose certain burdens and related costs on respondent clearing agencies. As discussed in Section IV.C.4, based on policies and procedures requirements for Regulation NMS, and based on staff conversations with industry representatives, the Commission has estimated the burdens and related costs of these requirements for clearing agencies.

The clearing agency standards in Rules 17Ad–22(c)(1) and (2) would require respondent clearing agencies to create policies and procedures. The requirements would impose one-time costs related to the adjustment of systems. These costs are included in the $3.7 million in startup costs discussed earlier.

The standards contained in Rule 17Ad–22(c) would also impose ongoing costs on clearing agencies. For example, the clearing agency standards in Rules 17Ad–22 (c)(1) and (2) would collectively require respondent clearing agencies to perform certain ongoing monitoring and enforcement activities with respect to the policies and procedures the clearing agency creates in response to the standard. These costs are included in the $10.1 million in annual costs discussed earlier. These rules may impose additional incremental costs related to, for example, employee training, systems testing, and other operational considerations designed to ensure both initial and continued compliance with such policies and procedures.

Rule 17Ad–22(c)(2) would require each clearing agency to post on its Web site its annual audited financial statements. The audited financial statements would have to (i) be a complete set of consolidated financial statements of the clearing agency and its subsidiaries for the most recent two fiscal years and be prepared in accordance with U.S. GAAP, except that for a clearing agency that is a corporation or other organization incorporated or organized under the laws of any foreign country the consolidated financial statements may be prepared according to U.S. GAAP or IFRS; (ii) be audited in accordance with standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01); and (iii) include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02). This requirement would necessitate work hours of compliance personnel and finance personnel at the clearing agency to compile relevant data, organize and analyze that data, and then post it to the clearing agency's Web site consistent with the rule. The requirement would also require the services of a registered public accounting firm. These costs are included in the $10.1 million in annual costs discussed earlier.

7. Minimum Standards for All Clearing Agencies

Rules 17Ad–22(d)(1)–(15) require certain minimum standards for rules and procedures to be met by all clearing agencies. Rule 17Ad–22(d)(1) requires that clearing agencies have rules and procedures that are well-founded, transparent and enforceable for each aspect of their activities in all relevant jurisdictions.[599] Rules 17Ad–22(d)(2)–(15) require that clearing agencies reasonably establish, implement, maintain and enforce written policies and procedures reasonably designed to:

[599] A relevant jurisdiction would include, among others, activities (i) In the United States, (ii) involving any means of interstate commerce, or (iii) in respect to providing clearing services to any U.S. person. Clearing agencies that operate in multiple jurisdictions may need to resolve possible conflicts of laws issues that they may encounter.

• Require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency,

• Hold assets in a manner whereby risk of loss or of delay in access to them is minimized,

• Identify sources of operational risk and minimize these risks through the development of appropriate systems, controls, and procedures,

• Employ money settlement arrangements that eliminate or strictly limit the clearing agency's settlement bank risks,

• Provide that their operations are cost-effective in meeting the requirements of participants while maintaining the safety and security of operations,

• Evaluate the potential sources of risks that can arise when the clearing agency establishes links either cross-border or domestically to clear or settle trades, and to ensure that these risks are managed prudently on an ongoing basis,

• Have governance arrangements that are clear and transparent to fulfil the public interest requirements in Section 17A of Exchange Act applicable to clearing agencies,[600] to support the objectives of owners and participants, and to promote the effectiveness of the clearing agency's risk management procedures,

• Provide market participants with sufficient information for them to identify and evaluate the risks and costs associated with using clearing agencies' services,

• Immobilize or dematerialize securities certificates and transfer them by book entry to the greatest extent possible when the clearing agency provides CSD services,

• Make key aspects of their default procedures publicly available and establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default,

• Ensure that final settlement occurs no later than the end of the settlement day and that intraday or real-time finality is provided where necessary to reduce risks,

• Eliminate principal risk by linking securities transfers to funds transfers to achieve delivery versus payment (DVP),[601]

• Institute risk controls, including collateral requirements and limits to cover the clearing agency's credit exposure to each participant family exposure fully, that ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle when the clearing agency provides CSD services[602] and extends intraday credit to participants,

• Disclose to their participants the clearing agency's obligations with respect to physical deliveries.[603]

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rules 17Ad–22(d)(1)–(15), as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release.

Rules 17Ad–22(d)(1)–(15) are consistent with CPSS–IOSCO Recommendations.[604] As discussed below, Rules 17Ad–22(d)(1)–(15) for the most part codify existing practices of clearing agencies registered with the Commission. Adopting rules that reflect current practices has the benefit of ensuring that future business practices are both consistent with current practice and conform to international standards without subjecting clearing agencies to significant costs. Accordingly, the Commission believes that registered clearing agencies would not need to build new infrastructure or modify operations to meet the requirements of Rule 17Ad–22(d).[605] The primary costs of implementing such rules will be the incremental costs of enhancing and reviewing existing policies and procedures for compliance and updating existing policies and procedures where appropriate as discussed above in Section IV.

The requirements would impose one-time costs and ongoing costs to perform certain ongoing monitoring and enforcement activities with respect to the policies and procedures that are included in the $3.7 million in startup costs and $10.1 million in ongoing cost discussed earlier.[606] The Rules also may impose incremental costs related to, for example, employee training, systems testing, and other operational considerations designed to ensure both initial and continued compliance with such policies and procedures.

As stated above, there are currently seven clearing agencies registered with the Commission that provide CCP or CSD services. These clearing agencies are SROs so the rules and procedures governing each aspect of the clearance and settlement process are filed with the Commission for notice and approval. Rule 17Ad–22(d)(1) will codify the existing practices of registered clearing agencies of establishing a rule book and developing policies and procedures to address each aspect of their operations. Therefore, the SRO rule filing process should help to ensure that such rules are well-founded, transparent, and provide an enforceable legal framework for its activities.

As described above, each registered clearing agency has established membership criteria and has procedures in place to monitor the sufficiency of its participants' financial resources. Rule 17Ad–22(d)(2) will codify these existing practices. The operational and financial stability of participants is subject to market forces and can therefore change over time. Because participants collectively contribute to the operational and financial stability of a registered clearing agency, the Commission believes that the proposed requirement to continue to monitor compliance with the registered clearing agency's participation requirements supports the Exchange Act requirement that clearing agencies are able to facilitate prompt and accurate clearance and settlement.[607]

In addition, clearing agencies would be required to have participation requirements that are objective,[608]

[600] Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a clearing agency be designed to protect investors and the public interest. 15 U.S.C. 78q–1(b)(3)(F).

[601] *See supra* note 422.

[602] *See* proposed Rule 17Ad–22(a)(2) for definition of ''central securities depository services.''

[603] The proposed rule would provide clearing agencies with the flexibility to determine the method by which the clearing agency will state this information to its participants. However, the clearing agencies should take care to develop an approach that provides sufficient notice to its participants regarding the clearing agency's obligations.

[604] *See* table in Section V.B.2.d.

[605] *See generally* International Monetary Fund, *Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Observance of the NSCC's Observance of the CPSS–IOSCO Recommendations for Central Counterparties* (2010), at 4–29, *available at http://www.imf.org/external/pubs/ft/scr/2010/cr10129.pdf;* International Monetary Fund, *Publication of Financial Sector Assessment Program Documentation—Detailed Assessment of Observance of the DTC's Observance of the CPSS–IOSCO Recommendations for Securities Settlement Systems* (2010), at 4–40, *available at http://www.imf.org/external/pubs/ft/scr/2010/cr10128.pdf.*

[606] This number also reflects the costs of Rules 17Ad–22(b)(1)–(3).

[607] 15 U.S.C 78q–1(b)(3)(A).

[608] Objective criteria would generally include, but not be limited to, criteria that are based on measureable facts such as capital requirements.

publicly disclosed, and facilitate fair and open access.[609] The Commission believes this requirement would foster compliance with the requirement under Section 17A of the Exchange Act that the rules of a registered clearing agency must not be designed to permit unfair discrimination in the admission of participants by requiring standards that are designed to be measurable, open and fair.[610]

During the clearance and settlement process, registered clearing agencies are responsible for safeguarding assets that secure participants' obligations. Registered clearing agencies currently seek to minimize the risk of loss or delay in access by holding assets that are highly-liquid (*e.g.,* cash, U.S. Treasury securities or securities issued by a U.S. government agency) and engaging banks to custody the assets and facilitate settlement. The requirements of Rule 17Ad–22(d)(3) are intended to codify existing practices and help ensure the ability of the registered clearing agency to meet its settlement obligations by reducing the likelihood that assets securing participant obligations to the registered clearing agency would be unavailable or insufficient when the registered clearing agency needs to draw on them.

Pursuant to guidance provided by the Division's Automated Review Policy Statement,[611] and Interagency White Paper on Disaster Recovery,[612] all registered clearing agencies, among other things, develop and maintain plans to assure the safeguarding of securities and funds, the integrity of the automated data processing systems, and recovery of securities, funds, or data under a variety of loss or destruction scenarios. In addition, the rule requires that clearing agencies have business continuity plans that allow for timely recovery of operations and ensure the fulfillment of a registered clearing agency's obligations. Rule 17Ad–22(d)(4) would codify existing practice and strengthen the requirement in Section 17A(b)(3)(F) of the Exchange Act, which requires that the rules of a registered clearing agency must be designed to ensure the safeguarding of securities and funds in the custody or control of the registered clearing agency or for which the registered clearing agency is responsible.[613] In this way, the Commission believes the rule also would promote protection of the financial market served by the registered clearing agency.

Registered clearing agencies use settlement banks to facilitate the cash portion of the securities transaction. Failure by that bank to effectuate timely and final settlement adversely affects the registered clearing agency by exposing it to credit and liquidity pressures that can adversely affect the registered clearing agency's ability to facilitate prompt and accurate clearance and settlement. Rule 17Ad–22(d)(5) is designed to reduce the risk that financial obligations related to the activities of a registered clearing agency are not settled in a timely manner or not discharged with finality. The Commission also believes that the rule would assist a registered clearing agency in meeting the requirement of Section 17A(b)(3)(F) of the Exchange Act, which requires the rules of a registered clearing agency to be designed to assure the safeguarding of securities and funds which are in the custody or control of the registered clearing agency or for which it is responsible.[614]

Registered clearing agencies have procedures to control costs and to regularly review pricing levels against operating costs. The Commission believes that Rule 17Ad–22(d)(6) codifies this practice and may help to reduce the fees a participant in a registered clearing agency incurs for clearance and settlement services while also helping to ensure that registered clearing agency maintains appropriate operational standards. Having clearing agencies be mindful of the costs that are incurred by their participants, while maintaining such compliance, should help to reduce inefficiencies in the provision of clearance and settlement services. Because there is often only a single registered clearing agency per asset class per market, competitive forces may not be sufficient by themselves in creating incentives to be cost-effective in meeting the requirements of participants.

Section 17A(a)(1)(D) of the Exchange Act states that the linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.[615] Further, Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a registered clearing agency foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[616] Each registered clearing agency is linked to other clearing organizations, trading platforms, and service providers. The Commission believes that in the clearance and settlement process, links should help improve market liquidity and make it easier for participants to trade in other markets.[617] Rule 17Ad–22(d)(7) promotes these statutory requirements under the Exchange Act and establishes a requirement that links created between clearing agencies are managed in a safe and prudent manner.

Each registered clearing agency has a board that governs the operations of the entity and supervises its senior management. Rule 17Ad–22(d)(8) is designed enhance the board's governance of the registered clearing agency and the ability of the registered clearing agency to serve the interests of its various constituencies while maintaining prudent risk management processes. Clear and transparent governance arrangements promote accountability and reliability in the decisions, rules and procedures of the registered clearing agency because they provide interested parties (such as owners, participants, and the general public) with information about how such decisions are made and what the

[609] Having open access, in part, involves having a process for admission of participants that does not unfairly discriminate. *See* 15 U.S.C. 78q–1(b)(3)(F) (''The rules of a registered clearing agency * * * are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the registered clearing agency''). In addition, the Dodd-Frank Act added Section 3C to the Exchange Act which provides in relevant part that the rules of a registered clearing agency described in paragraph (1) shall prescribe that all security-based swaps submitted to the registered clearing agency with the same terms and conditions are economically equivalent within the registered clearing agency and may be offset with each other within the registered clearing agency; and provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility. Public Law 111–203 sec. 763(a) (adding Section 3C to the Exchange Act).

[610] 15 U.S.C. 78q–1(b)(3)(F).

[611] *See* Automation Review Policy Statements, *supra* note 330. The Automation Review Policy Statements are not rules, but rather general statements of policy based on cooperation between the SROs and the Commission.

[612] Sound Practices to Strengthen the Resilience of the U.S. Financial System (Interagency Paper), Release No. 34–47638; File No. S7–32–02 (Apr. 7, 2003).

[613] 15 U.S.C. 78q–1(b)(3)(F).

[614] 15 U.S.C. 78q–1(b)(3)(F).

[615] 15 U.S.C. 78q–1(a)(1)(D).

[616] 15 U.S.C. 78q–1(b)(3)(F).

[617] For example, DTC Canadian Link Service allows qualifying DTC participants to clear and settle valued securities transactions with participants of a Canadian securities depository. The link is designed to facilitate cross-border transactions by allowing participants to use a single depository interface for U.S. and Canadian dollar transactions and eliminate the need for split inventories. *See* Exchange Act Release Nos. 52784 (Nov. 16, 2005), 71 FR 70902 (Nov. 23, 2005) and 55239 (Feb. 5, 2007), 72 FR 6797 (Feb. 13, 2007) (File No. SR–DTC 2006–15).

rules and procedures are designed to accomplish.[618]

Governance arrangements have the potential to play an important role in making sure that clearing agencies fulfill the Exchange Act requirements that the rules of a registered clearing agency be designed to protect investors and the public interest and to support the objectives of owners and participants. Similarly, governance arrangements may promote the effectiveness of a registered clearing agency's risk management procedures by creating an oversight framework that fosters a focus on the critical role that risk management plays in promoting prompt and accurate clearance and settlement.[619]

Because clearing agencies are SROs, their rules are published by the Commission and are available on each registered clearing agency's Web site. In addition information regarding the operations and services of each clearing agency can be found either on the clearing agency's Web site or a Web site maintained by an affiliated entity of the clearing agency. Rule 17Ad–22(d)(9) will maintain and enhance this existing practice by requiring a registered clearing agency to disclose information sufficient for participants to identify risks and costs associated with using the registered clearing agency, thereby allowing participants to make informed decisions about the use of the registered clearing agency and to take appropriate actions to mitigate their risks and costs associated with the use of the registered clearing agency.

While U.S. markets have made great strides in achieving immobilization and/or dematerialization for institutional and broker-to-broker transactions, many industry representatives believe that the small percentage of securities held in certificated form impose unnecessary risk and expense to the industry and to investors. Rule 17Ad–22(d)(10) will codify the existing practice, and promote further immobilization and dematerialization of securities and their transfer by book entry. This would result in reduced costs and risks associated with securities settlements and custody for both clearing agencies and participants by removing the need to hold and transfer many, if not most, physical certificates.[620]

Each registered clearing agency makes public rules, policies or procedures that set forth the actions the clearing agency may take in the event of a participant default and each makes key aspects of their default procedures publicly available, with the exception of certain of their policies and procedures that are kept non-public to ensure their integrity, such as those associated with the oversight of clearing participants. Rule 17Ad–22(d)(11) codifies this existing practice. The Commission believes that default procedures reduce the likelihood that a default by a participant, or multiple participants, will disrupt the operations of the clearing agency and have a cascading effect on the viability of the other participants of the clearing agency. Default procedures also allow a clearing agency to wind down positions in an orderly way and continue to perform its obligations in the event of a participant default, assuring continued functioning of the securities market in times of stress and reducing systemic risk.

The Commission believes that Rule 17Ad–22(d)(11) would increase the probability that defaults by participants, should they occur, would proceed in an orderly and transparent manner. This is the case because the rule would help to ensure that all participants are aware of the default process and are able to plan accordingly and that clearing agencies would have sufficient time to take corrective actions to mitigate potential losses. In addition, the transparency of default procedures will increase the confidence of market participants as well as members of the general public, that should a default occur, the proper procedures would be followed, decreasing uncertainty and lessening the likelihood of further market stress.

Each registered clearing agency has rules, policies or procedures that provide for the settlement of its respective securities transactions no later than the end of a pre-defined settlement day. Rule 17Ad–22(d)(12) codifies this existing practice. The Commission believes that settlement finality should occur no later than the end of the settlement day to limit the volume of outstanding obligations that are subject to settlement at any one time and thereby reduce the settlement risk exposure of participants and the registered clearing agency. Intraday or real-time finality may be necessary to reduce risk in circumstances where the lack of intraday or real-time finality may impede the registered clearing agency's ability to facilitate prompt and accurate clearance and settlement, cause the registered clearing agency's participants to fail to meet their obligations, or cause significant disruptions in the securities markets.[621]

Generally, Rules 17Ad–22(d)(13)–(15) would apply to registered clearing agencies that provide CSD services. DTC currently is the only registered clearing agency that is a CSD. DTC operates a Model 2 DVP system which provides for gross settlements of securities transfers during the day followed by an end of day net funds settlement.[622] Rule 17Ad–22(d)(13) codifies this existing practice. Delivery versus payment eliminates the risk that a buyer would lose the purchase price of a security purchased from a defaulting seller (or that a seller would lose the sold security without receiving payment for a security acquired by a defaulting buyer), because payment is made only if securities are delivered. While the use of this payment method eliminates principal risk, DVP procedures do not eliminate the risk that the failure of the defaulting participant could result in systemic disruptions, because the failure of a participant could produce substantial liquidity pressures and replacement costs.

As discussed above, DTC has policies and procedures in place to ensure that timely settlement can be completed in the event of the default participant with the largest settlement obligation. DTC establishes setting limits (called net debit caps) for each participant. The net debit cap ensures that the amount of cash that a participant owes the clearing agency does not exceed this pre-defined limit or cap. Rule 17Ad–22(d)(14) codifies this existing practice. The Commission believes it is important for *clearing agencies that provide CSD services to institute* risk controls, including collateral requirements and limits to cover the registered clearing agency's credit exposure to each participant exposure fully, that ensure timely settlement in these circumstances to address the risk that the participant may fail to settle after credit has been extended. The Commission also believes that requiring the controls to be designed to withstand

[618] The Exchange Act currently requires that certain aspects of a registered clearing agency's governance arrangements be made clear and transparent. Section 19(b) of the Exchange Act requires that clearing agencies, as SROs, file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of the registered clearing agency, accompanied by a concise general statement of the basis and purpose of the proposed rule change. 15 U.S.C. 78s(b).

[619] The role of governance arrangements in promoting effective risk management has also been a focus of rules recently proposed by the Commission to mitigate conflicts of interest at security-based swap clearing agencies. *See* Exchange Act Release No. 63107, 75 FR 65882, *supra* note 231.

[620] *See* Exchange Act Release No. 8398 (Mar. 11, 2004), 69 FR 12921 (Mar. 18, 2004).

[621] *See FMI Report,* Principle 8, *supra* note 32.

[622] *See* DTC's *Assessment of Compliance with the CPSS/IOSCO Recommendations for Central Counterparties* (Dec. 12, 2011), *available at http://www.dtcc.com/legal/compliance/DTC_Self-Assessment.pdf.*

the inability of the participant with the largest payment obligation to settle, in such circumstances, would reduce the likelihood of disruptions at the registered clearing agency by having controls in place to account for the largest possible loss from any individual participant and thereby help the registered clearing agency to provide prompt and accurate clearance and settlement during times of market stress.

A registered clearing agency faces both credit and liquidity risks from the delivery process. At delivery, the entire principal value of a transaction may be at risk, and this form of credit risk is often termed principal risk. Liquidity risk arises because the registered clearing agency, faced with a defaulting participant, must still make payment to the non-defaulting party. The Commission believes that a registered clearing agency should therefore ensure that its rules and procedures provide clear risk management controls so that it can identify and mitigate the credit and liquidity risks to which it is exposed in the delivery process. These procedures should ensure that the registered clearing agency will be able to adapt its risk management framework as appropriate, as the steps necessary to mitigate risks will depend on the obligations the registered clearing agency has assumed, the mechanisms available for settlement, and the importance of the risks from physical settlement to its overall operations.

The Commission also believes that providing such information to participants would promote a shared understanding regarding physical delivery practices between the registered clearing agency and its participants that could help reduce the potential for fails and thereby facilitate prompt and accurate clearance and settlement.

Registered clearing agencies have rules and procedures that describe their obligations to its participants when they assume deliveries of physical instruments. The Commission believes that Rule 17Ad–22(d)(15), by requiring a statement by the registered clearing agency to its participants about the cleaning agency's obligations with respect to physical deliveries, among other things, would ensure that participants have information that is likely to enhance the participants' understanding of their rights and responsibilities with respect to using the clearance and settlement services of the registered clearing agency. The Commission believes that ensuring delivery of this information to participants about the clearing agency's physical delivery obligations would promote a shared understanding about physical delivery practices between the clearing agency and its participants that would help mitigate misunderstandings in the clearing agency's physical delivery operations and would therefore facilitate prompt and accurate clearance and settlement.

The Commission carefully considered alternatives to Rule 17Ad–22(d), including a more prescriptive approach suggested by some of the commenters, and has decided to adopt the rule, modeled after recognized international standards, in the form proposed. The Commission believes the final rule will have the effect of harmonizing the Commission's regulatory requirements with such standards as are now contemplated by the Exchange Act and the Clearing Supervision Act, as well as international standards. In particular, the Commission believes Rule 17Ad–22(d) will help market participants compare the operations of U.S. clearing agencies with non-U.S. clearing organizations. The Commission's adoption of Rule 17Ad–22(d) may also reduce some of the potential regulatory burden for CCPs and CSDs that may be dually-regulated by the SEC and another domestic or foreign regulator because it is modeled on standards already employed by other regulatory authorities.

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[623] requires the Commission, in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the Proposing Release, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (''RFA''),[624] that the proposed rule would not, if adopted, have a significant impact on a substantial number of small entities. We received no comments on this certification.

A. Registered Clearing Agencies

Rule 17Ad–22 applies to all registered clearing agencies and sets standards for such clearing agencies. For the purposes of Commission rulemaking and as applicable to Rule 17Ad–22, a small entity includes, when used with reference to a clearing agency, a clearing agency that (i) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter) and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[625] Under the standards adopted by the Small Business Administration, small entities in the finance industry include the following: (i) For entities engaged in investment banking, securities dealing and securities brokerage activities, entities with $6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with $6.5 million or less in annual receipts; and (iii) funds, trusts and other financial vehicles with $6.5 million or less in annual receipts.[626]

Based on the Commission's existing information about the clearing agencies currently registered with the Commission, the Commission believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and become eligible to operate as registered clearing agencies and while other security-based swap lifecycle event service providers may be required to register as clearing agencies, the Commission does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.[627] Furthermore, we believe it is unlikely that any registered clearing agencies, security-based swap clearing agencies or security-based swap lifecycle event services providers would have annual receipts of less than $6.5 million. Accordingly, the Commission believes that any registered clearing agencies will exceed the thresholds for ''small entities'' set forth in Exchange Act Rule 0–10.

B. Certification

For the reasons described above, the Commission again certifies that Rule 17Ad–22 will not have a significant economic impact on a substantial number of small entities.

VII. Statutory Authority and Text of Rule 17Ad–22

Pursuant to the Exchange Act, particularly, Sections 17A(d) thereof, 15 U.S.C. 78q–1(d), Sections 17A(i), 17A(j) and 3C(j) thereof, 15 U.S.C. 78q–1(i), 78q–1(j) and 78c–3(j), respectively, Pub. L. 111–203, § 763, 124 Stat. 1841 (2010), and Sections 30(b) and 30(c) thereof, 15 U.S.C. 78dd(b)and (c), and Section

[623] 5 U.S.C. 601 *et seq.*

[624] *See* 5 U.S.C. 605(b).

[625] 17 CFR 240.0–10(d).

[626] 13 CFR 121.201, Sector 52.

[627] *See* 17 CFR 240.0–10(d). The Commission based this determination on its review of public sources of financial information about existing CCPs serving the OTC derivatives market and lifecycle event service providers.

805(a)(2) of the Clearing Supervision Act, 12 U.S.C. 5464(a)(2), the Commission adopts new Rule 17Ad–22 to govern clearing agencies.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE

■ 1. The authority citation for Part 240 is amended by revising the general authority and adding an authority for § 240.17Ad–22 in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 12 U.S.C. 5221(e)(3), 15 U.S.C. 8302, and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 240.17Ad–22 is also issued under 12 U.S.C. 5464(a)(2).

* * * * *

■ 2. Section 240.17Ad–22 is added to read as follows:

§ 240.17Ad–22 Standards for clearing agencies.

(a) *Definitions.* For purposes of this section:

(1) *Central counterparty* means a clearing agency that interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer.

(2) *Central securities depository services* means services of a clearing agency that is a securities depository as described in Section 3(a)(23) of the Act (15 U.S.C. 78c(a)(23)(A)).

(3) *Participant family* means that if a participant directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another participant then the affiliated participants shall be collectively deemed to be a single participant family for purposes of paragraphs (b)(3) and (d)(14) of this section.

(4) *Normal market conditions* as used in paragraphs (b)(1) and (2) of this section means conditions in which the expected movement of the price of cleared securities would produce changes in a clearing agency's exposures to its participants that would be expected to breach margin requirements or other risk control mechanisms only one percent of the time.

(5) *Net capital* as used in paragraph (b)(7) of this section means net capital as defined in § 240.15c3–1 for broker-dealers or any similar risk adjusted capital calculation for all other prospective clearing members.

(b) A registered clearing agency that performs central counterparty services shall establish, implement, maintain and enforce written policies and procedures reasonably designed to:

(1) Measure its credit exposures to its participants at least once a day and limit its exposures to potential losses from defaults by its participants under normal market conditions so that the operations of the clearing agency would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control.

(2) Use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements and review such margin requirements and the related risk-based models and parameters at least monthly.

(3) Maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions; provided that a registered clearing agency acting as a central counterparty for security-based swaps shall maintain additional financial resources sufficient to withstand, at a minimum, a default by the two participant families to which it has the largest exposures in extreme but plausible market conditions, in its capacity as a central counterparty for security-based swaps. Such policies and procedures may provide that the additional financial resources may be maintained by the security-based swap clearing agency generally or in separately maintained funds.

(4) Provide for an annual model validation consisting of evaluating the performance of the clearing agency's margin models and the related parameters and assumptions associated with such models by a qualified person who is free from influence from the persons responsible for the development or operation of the models being validated.

(5) Provide the opportunity for a person that does not perform any dealer or security-based swap dealer services to obtain membership on fair and reasonable terms at the clearing agency to clear securities for itself or on behalf of other persons.

(6) Have membership standards that do not require that participants maintain a portfolio of any minimum size or that participants maintain a minimum transaction volume.

(7) Provide a person that maintains net capital equal to or greater than $50 million with the ability to obtain membership at the clearing agency, provided that such persons are able to comply with other reasonable membership standards, with any net capital requirements being scalable so that they are proportional to the risks posed by the participant's activities to the clearing agency; provided, however, that the clearing agency may provide for a higher net capital requirement as a condition for membership at the clearing agency if the clearing agency demonstrates to the Commission that such a requirement is necessary to mitigate risks that could not otherwise be effectively managed by other measures and the Commission approves the higher net capital requirement as part of a rule filing or clearing agency registration application.

(c) *Record of financial resources and annual audited financial statements.* (1) Each fiscal quarter (based on calculations made as of the last business day of the clearing agency's fiscal quarter), or at any time upon Commission request, a registered clearing agency that performs central counterparty services shall calculate and maintain a record, in accordance with § 240.17a–1 of this chapter, of the financial resources necessary to meet the requirements of paragraph (b)(3) of this section, and sufficient documentation to explain the methodology it uses to compute such financial resource requirement.

(2) Within 60 days after the end of its fiscal year, each registered clearing agency shall post on its Web site its annual audited financial statements. Such financial statements shall:

(i) Include, for the clearing agency and its subsidiaries, consolidated balance sheets as of the end of the two most recent fiscal years and statements of income, changes in stockholders' equity and other comprehensive income and cash flows for each of the two most recent fiscal years;

(ii) Be prepared in accordance with U.S. generally accepted accounting principles, except that for a clearing agency that is a corporation or other organization incorporated or organized under the laws of any foreign country the consolidated financial statements may be prepared in accordance with

U.S. generally accepted accounting principles or International Financial Reporting Standards as issued by the International Accounting Standards Board;

(iii) Be audited in accordance with standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with 17 CFR 210.2–01; and

(iv) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of 17 CFR 210.2–02.

(d) Each registered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable:

(1) Provide for a well-founded, transparent, and enforceable legal framework for each aspect of its activities in all relevant jurisdictions.

(2) Require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency; have procedures in place to monitor that participation requirements are met on an ongoing basis; and have participation requirements that are objective and publicly disclosed, and permit fair and open access.

(3) Hold assets in a manner that minimizes risk of loss or of delay in its access to them; and invest assets in instruments with minimal credit, market and liquidity risks.

(4) Identify sources of operational risk and minimize them through the development of appropriate systems, controls, and procedures; implement systems that are reliable, resilient and secure, and have adequate, scalable capacity; and have business continuity plans that allow for timely recovery of operations and fulfillment of a clearing agency's obligations.

(5) Employ money settlement arrangements that eliminate or strictly limit the clearing agency's settlement bank risks, that is, its credit and liquidity risks from the use of banks to effect money settlements with its participants; and require funds transfers to the clearing agency to be final when effected.

(6) Be cost-effective in meeting the requirements of participants while maintaining safe and secure operations.

(7) Evaluate the potential sources of risks that can arise when the clearing agency establishes links either cross-border or domestically to clear or settle trades, and ensure that the risks are managed prudently on an ongoing basis.

(8) Have governance arrangements that are clear and transparent to fulfill the public interest requirements in Section 17A of the Act (15 U.S.C. 78q–1) applicable to clearing agencies, to support the objectives of owners and participants, and to promote the effectiveness of the clearing agency's risk management procedures.

(9) Provide market participants with sufficient information for them to identify and evaluate the risks and costs associated with using its services.

(10) Immobilize or dematerialize securities certificates and transfer them by book entry to the greatest extent possible when the clearing agency provides central securities depository services.

(11) Make key aspects of the clearing agency's default procedures publicly available and establish default procedures that ensure that the clearing agency can take timely action to contain losses and liquidity pressures and to continue meeting its obligations in the event of a participant default.

(12) Ensure that final settlement occurs no later than the end of the settlement day; and require that intraday or real-time finality be provided where necessary to reduce risks.

(13) Eliminate principal risk by linking securities transfers to funds transfers in a way that achieves delivery versus payment.

(14) Institute risk controls, including collateral requirements and limits to cover the clearing agency's credit exposure to each participant family exposure fully, that ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle when the clearing agency provides central securities depository services and extends intraday credit to participants.

(15) State to its participants the clearing agency's obligations with respect to physical deliveries and identify and manage the risks from these obligations.

By the Commission.

Dated: October 22, 2012.

Elizabeth M. Murphy,

Secretary.

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Part III

Commodity Futures Trading Commission

17 CFR Parts 1, 4, 5, et al.
Adaptation of Regulations to Incorporate Swaps; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 38, 41, 140, 145, 155, and 166

RIN Number 3038–AD53

Adaptation of Regulations To Incorporate Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'' or ''DFA'') established a comprehensive new statutory framework for swaps and security-based swaps. The Dodd-Frank Act repeals some sections of the Commodity Exchange Act (''CEA'' or ''Act''), amends others, and adds a number of new provisions. The DFA also requires the Commodity Futures Trading Commission (''CFTC'' or ''Commission'') to promulgate a number of rules to implement the new framework. The Commission has proposed and finalized numerous rules to satisfy its obligations under the DFA. This rulemaking makes a number of conforming amendments to integrate the CFTC's regulations more fully with the new framework created by the Dodd-Frank Act.

DATES: Effective January 2, 2013.

FOR FURTHER INFORMATION CONTACT: Peter A. Kals, Special Counsel, 202–418–5466, *pkals@cftc.gov,* Division of Clearing and Risk; Elizabeth Miller, Attorney-Advisor, 202–418–5450, *emiller@cftc.gov,* Division of Swap Dealer and Intermediary Oversight; David E. Aron, Counsel, 202–418–6621, *daron@cftc.gov,* Office of General Counsel; Alexis Hall-Bugg, Attorney-Advisor, 202–418–6711, *ahallbugg@cftc.gov,* Division of Market Oversight; Katherine Driscoll, Senior Trial Attorney, 202–418–5544, *kdriscoll@cftc.gov,* Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.[1] Title VII of the Dodd-Frank Act[2] (''Title VII'') amended the CEA[3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (''SDs''), security-based swap dealers, major swap participants (''MSPs''), and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To apply its regulatory regime to the swap activity of intermediaries, the Commission must make a number of changes to its regulations to conform them to the Dodd-Frank Act. On June 7, 2011, the Commission published in the **Federal Register** a proposal to make such changes (''the Proposal'').[4] There was a 60-day period for the public to comment on the Proposal, which ended on August 8, 2011. The Commission received 39 comment letters from a variety of institutions, including designated contract markets (''DCMs''), agricultural trade associations, and agricultural cooperatives.[5] The Commission has determined to adopt the proposed rules primarily in the form proposed with certain modifications, discussed below, to address the comments the Commission received. With respect to certain of the proposed changes to regulation 1.35[6] (regarding recording of oral communications and the scope of written communications) and related amendments to regulation 1.31, the Commission has determined to address those changes in a final rule in a separate release.

The Commission is mindful of, and continues to consider, the comments received on the Proposal's amendments to regulation 1.35 (records of commodity interest and cash commodity transactions). Those comments were submitted by various groups, including DCMs, representatives of the FCM and IB communities, energy

[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act is available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[2] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.* (2006).

[4] Adaptation of Regulations to Incorporate Swaps, 76 FR 33066 (June 7, 2011) (''Proposing Release'').

[5] Comment letters are available in the comment file on *www.cftc.gov.*

[6] All Commission regulations are in Chapter I of Title 17 of the CFR.

end-users, and agricultural trade associations and cooperatives.[7] These commenters focused primarily on: the proposed oral communications recordkeeping requirement, in general; the proposed requirement that all members of a DCM or SEF, including unregistered commercial end-users and non-intermediaries, keep records of the oral communications that lead to the execution of a cash commodity transaction; and the proposed requirement that each record be maintained in a separately identifiable electronic file identifiable by transaction and counterparty. Many of the comments were directed specifically toward narrowing the scope of the proposed changes to regulation 1.35 regarding recording of oral communications and written communications (and related amendments to regulation 1.31).

The amendments adopted by this rulemaking primarily affect part 1 of the Commission's regulations, but also affect parts 4, 5, 7, 8, 15, 16, 18, 21, 22, 36, 41, 140, 145, 155, and 166. This rulemaking contains amendments of three different types: ministerial, accommodating, and substantive. Many of the amendments are purely ministerial—for instance, several changes update definitions to conform them to the CEA as amended by the Dodd-Frank Act; add to the Commission's regulations new terms created by the Dodd-Frank Act; remove all regulations and references pertaining to derivatives transaction execution facilities (''DTEFs''), a category of trading facility added to the CEA by section 111 of the Commodity Futures Modernization Act of 2000 (''CFMA''),[8] which the DFA eliminated; correct various statutory cross-references to the CEA in the regulations; and remove regulations in whole or in part that were rendered moot by the CFMA.

The accommodating amendments are essential to the implementation of the DFA in that they propose to add swaps, swap markets, and swap entities to numerous definitions and regulations, but are more than ministerial because they require some judgment in drafting. Accommodating amendments include, among other things, amending numerous definitions in regulation 1.3 to reference or include swaps; creating new definitions as necessary in regulation 1.3; amending recordkeeping requirements to include information on swap transactions; adding references to swaps and swap execution facilities (''SEFs'') in various part 1 regulations; and amending parts 15, 18, 21, and 36 to implement the DFA's grandfathering and phase-out of exempt boards of trade and exempt commercial markets.

The substantive amendments are changes that align requirements or procedures across futures and swap markets. They consist of amendments to regulation 1.31 that harmonize some of the current part 1 recordkeeping requirements with some of those applicable to SDs and MSPs under part 23 regulations[9] and amend procedures pertaining to the post-execution allocation of bunched orders (regulation 1.35(a)). Under the amendments to the bunched orders provisions, ''eligible account managers'' can allocate such orders post-execution similarly to how they currently do so with futures.

To aid the public in understanding the numerous changes to different parts of the CFTC's regulations adopted by this release, the Commission will also publish on its Web site a ''redline'' of the affected regulations which will clearly reflect the additions and deletions.[10]

II. Comments Received and Amended Regulations

A. General Comments

Several commenters argued that the Proposal was premature because many other rules remained to be proposed and finalized,[11] and subsequent final rulemakings may dictate which conforming amendments will be necessary. A joint letter by certain Electric Utility Trade Associations (''the ETA'') contended that the incomplete nature of the swap regulatory regime renders it unable to ''effectively comment,'' because it lacks a full understanding of the entire swap regulatory landscape. In the ETA's view, the ''premature'' nature of the Proposal rises to the level of a violation of the Administrative Procedures Act (''APA'').[12] The ETA commented further that because the Proposal updated certain regulations by treating swaps equivalently to futures, the Proposal ''represents a fundamental misunderstanding'' of the executing electric industry swap market, and, consequently, should be withdrawn. The ETA also noted that, ''[f]rom time to time, the Commission's staff has declined to consider whether nonfinancial commodity and related swap markets are indeed different in any meaningful way from other markets,'' and that the ETA ''continues to urge the Commission to engage in a considered analysis of such differences and the implications of such differences for its rulemaking process.'' The CME Group (''CME'') argued that the Commission should have waited to propose the voice and electronic recordkeeping requirements in regulation 1.35(a) until SEFs register, the Dodd-Frank Act clearing and exchange trading requirements take effect, and Dodd-Frank Act recordkeeping and reporting requirements take effect. The Electric Power Supply Association (''EPSA'') commented that final rules defining swap, SD, and MSP must be published prior to proposing a rule conforming the Commission's regulations to the Dodd-Frank Act and related regulations. Therefore, EPSA argued, the Proposal should be withdrawn. Mr. Chris Barnard generally supported the Proposal, commenting that the proposed changes were either common sense or required by the DFA.

The Commission believes it was appropriate to have published the Proposal when it did. The purpose of this rulemaking is to conform the Commission's regulations to the CEA as

[7] Commenters on this issue include: American Cotton Shippers Association; Agribusiness Association of Iowa; Agribusiness Association of Ohio; Agribusiness Council of Indiana; Trade Association of American Cotton Cooperatives; Commodity Markets Council; Falmouth Farm Supply; American Feed Industry Association; Grain and Feed Association of Illinois; Minnesota Grain and Feed Association; National Grain and Feed Association; Oklahoma Grain and Feed Association; Rocky Mountain Agribusiness Association; South Dakota Grain and Feed Association; Land O'Lakes; National Council of Farmer Cooperatives; American Gas Association; National Gas Supply Association; Fertilizer Institute; American Petroleum Institute; Electric Power Supply Association; National Rural Electric Cooperative Association; American Public Power Association; Large Public Power Council; Edison Electric Institute; Working Group of Commercial Energy Firms; IntercontinentalExchange Inc.; Kansas City Board of Trade; Minneapolis Grain Exchange; CME Group; Futures Industry Association; Barclays Capital; Henderson & Lyman; National Introducing Brokers Association; and National Futures Association.

[8] Public Law 106–554, 114 Stat. 2763 (2000).

[9] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) (adopting for SDs and MSPs reporting and recordkeeping standards now found in 17 CFR 23.201–23.203).

[10] The redline does not, in and of itself, have any legal authority.

[11] A joint letter by the American Gas Association, Commodity Markets Council, National Gas Supply Association, and the Fertilizer Institute (''AGA et al.''); Commodity Markets Council (''CMC''); Electric Power Supply Association; certain Electric Utility Trade Associations; and the Working Group of Commercial Energy Firms (''Working Group'').

[12] *See* ETA Letter (claiming that ''[t]he [Proposal] cannot fairly apprise interested persons of the nature of the Commission's rulemaking, nor can it provide notice of 'the terms of substance of the proposed rule or a description of the subjects and issues involved,' as required by the [APA], when the proposed rules purport to adapt to a moving target.'').

revised by the DFA where necessary (to avoid conflicting statutory and regulatory definitions of the same term, for example) or desirable (*e.g.,* to make retention periods for records of all swap transactions consistent with those recently adopted for the records of swap transactions of SDs). The Commission viewed many of these changes to be non-controversial. For example, the DFA amended the definition of FCM in section 1a of the CEA to permit FCMs to execute and clear swaps for customers in addition to futures. Accordingly, the Proposal updated regulation 1.3's definition of FCM, as well as recordkeeping requirements in regulations 1.31, 1.33, and 1.35, so that an FCM's duties with respect to swaps would mirror its duties with respect to futures. Because IBs and FCMs can execute or clear cleared swaps analogously to futures, the Commission believes that certain of the requirements in regulations 1.31, 1.33, and 1.35, which describe recordkeeping requirements for FCMs and IBs, can and should apply equivalently to an FCM's futures and cleared swaps business. In response to the ETA's comment that the Proposal inappropriately equated swaps with futures, the Commission notes that part 23 of the Commission's regulations addresses issues unique to the swap market by describing recordkeeping and other ''business conduct'' requirements for SDs and MSPs.

The Commission believes it is appropriate to make these conforming changes at this time. In adopting this final rule, the Commission is incorporating any changes necessitated by other final Dodd-Frank Act rulemakings.

B. Part 1

1. Regulation 1.3: Definitions

a. General Changes

The Commission is revising regulation 1.3 so that its definitions, which are used throughout the Commission's regulations, incorporate relevant provisions of the DFA. For instance, amended regulation 1.3 updates current definitions to conform them to the Dodd-Frank Act's amendments of the same terms in the CEA's definitions section,[13] and also includes definitions specifically added by the Dodd-Frank Act to the CEA. This is the case for many of the definitions in proposed regulation 1.3, including ''commodity pool operator,'' ''commodity trading advisor,'' ''futures commission merchant,'' ''introducing broker,'' ''floor broker,'' ''floor trader,'' ''swap data repository,'' and ''swap execution facility.'' For example, section 721(a)(5) of the DFA amended the definition of ''commodity pool operator'' (''CPO'') in CEA section 1a to add swaps to those contracts for which soliciting funds for a collective investment renders a person a CPO. Consequently, today's final rulemaking updates the definition of CPO in regulation 1.3 to match the DFA's new definition of that term. The Commission did not receive comments about the Proposal's revised definitions of ''commodity pool operator,'' ''commodity trading advisor,'' ''futures commission merchant,'' ''floor broker,'' ''floor trader,'' ''swap data repository,'' and ''swap execution facility.'' The Commission is adopting these definitions as proposed.

In response to the proposed conforming amendments to the definition of ''introducing broker,'' Financial Services Roundtable (''FSR'') commented that a small commercial lender facilitating a swap transaction between a borrower and a third party, solely in connection with the lender's loan origination or syndication, should not have to register as an introducing broker (''IB''), but could possibly be required to do so under the amended definition. FSR commented further that such a result would be inconsistent with a 2004 staff no-action letter,[14] in which the Commission's Division of Clearing and Intermediary Oversight explained that the purpose of registering and regulating IBs is to protect the public from sales abuses—according to FSR, such a concern does not exist in the situation FSR described. Specifically, FSR recommended that the Commission further define the term ''introducing broker'' to specifically exclude the lenders it described, or in the alternative, that the Commission issue interpretative guidance addressing this issue.

The Commission declines to further define the term ''introducing broker'' as FSR requested, and is adopting the term as proposed. However, the Commission believes that in the situation described by FSR, the small commercial lender would not be required to register as an IB, as long as it did not receive compensation from the third party with whom the lender arranges the borrower's swap. This analysis is based solely on the facts as presented by FSR in its comment letter and is consistent with previously issued staff no-action or interpretative letters.[15] Staff can issue further guidance, as appropriate, on a case-by-case basis under regulation 140.99.[16]

Additionally, the Proposal revised the definition of ''self-regulatory organization'' (''SRO'') (regulation 1.3(ee)) to include SEFs, a new category of regulated markets under the DFA, and derivatives clearing organizations (''DCOs''). The Commission did not receive any comments concerning its proposal to amend this definition. Today's final rulemaking amends the definition of SRO by including SEFs. However, it does not amend the definition of SRO to include DCOs. Upon further reflection, the Commission has determined that the part 1 regulations applicable to SROs need not apply to DCOs in light of recently finalized regulations in part 39 implementing the Act's Core Principles for DCOs.[17] For example, paragraph (6) of regulation 39.12(a) (''Participant and product eligibility'') requires a DCO to have the ability to enforce compliance

[13] CEA section 1a, 7 U.S.C. 1a.

[14] CFTC No-Action Letter No. 04–34 at 3 (Sept. 16, 2004).

[15] FSR stated that the lenders it described receive compensation ''in connection with lending and retaining risk and not in connection with introducing a [swap provider].'' A key element of both the previous and amended definitions of IB is that the person engages in the described conduct ''for compensation or profit, whether direct or indirect.'' 17 CFR 1.3(mm). This analysis is consistent with past Commission guidance requiring an individual to register as an IB based on referring customers to a commodity trading advisor and receiving compensation in return. CFTC Interp. Letter No. 86–27 (Introducing Broker Registration Requirements), Comm. Fut. L. Rep. (CCH) ¶ 23,364, CFTC (Nov. 24, 1986). This letter emphasized that ''the presence or absence or[sic] per-trade compensation is not determinative of whether one falls within the definition of an introducing broker. The Commission's final rule expressly eliminated the form and manner of compensation as the principal measure of whether registration as an introducing broker would be required * * * [P]ursuant to the express terms of the introducing broker definition in rule 1.3(mm), any compensation (without regard to whether such compensation is per-trade or otherwise) for the solicitation or acceptance of orders * * * brings one within the definition.'' *Id.* (footnotes omitted). Therefore, if the lenders FSR described receive compensation from the swap providers for their customer referrals, then the lenders would fall within the definition and be required to register as IBs.

[16] Separately, the Commission notes that the activity of an associated person ''AP'' of an SD may resemble the swap activity of an IB. The definition of IB in regulation 1.3(mm), as amended by today's final rule, excludes an AP, including an AP of an SD. Pursuant to paragraph (6) of the definition of AP in regulation 1.3(aa), an AP of an SD could be an agent of the SD while not an employee of the SD. This may be the case, for example, where an employee of an affiliate of the SD is authorized to negotiate swap transactions on behalf of the SD. Where such an agency relationship is present, the Commission would not consider the employer of such an AP of an SD to be an IB due to the activities of that AP of the SD.

[17] DCO General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011).

with its participation requirements and to establish procedures for the suspension and orderly removal of clearing members that no longer meet the requirements. Moreover, the Commission is in the midst of other rulemakings pertaining to the responsibilities of SROs and DCOs, *e.g.,* proposed regulations regarding the governance of DCOs.[18]

b. Various Amended and New Definitions (Regulation 1.3)

The Commission is (1) simplifying or clarifying certain existing regulation 1.3 definitions, and (2) adding several new definitions to regulation 1.3, pursuant to amendments to the CEA by the Dodd-Frank Act, existing regulations, and other amendments in the Proposal.

The term ''contract market,'' for instance, is not defined under the CEA, and is currently defined under regulation 1.3(h) as ''a board of trade designated by the Commission as a contract market under the Commodity Exchange Act or in accordance with the provisions of part 33 of this chapter.'' In certain provisions throughout the Commission's regulations, contract markets are also referred to as ''designated contract markets.'' Because both terms are used interchangeably within the regulations, the Commission has decided to revise the definition to mean contract market and designated contract market (''DCM''). Proposed regulation 1.3(h) contained one definition identified by the title ''Contract market; designated contract market.'' The proposed definition also corrected an erroneous cross-reference to part 33 as the regulations applicable to DCMs, which the Commission is correcting by changing it to a reference to part 38 of the Commission's regulations. No commenters addressed these changes. The Commission is adopting the definition in regulation 1.3(h) as proposed with one modification to reflect the fact that the Commission designates a board of trade as a contract market ''under the Act and in accordance with part 38'' as opposed to ''under the Act or in accordance with part 38.''

The Proposal contained a similar clarification regarding the definition of ''customer.'' It simplified the definition of ''customer'' by combining two existing definitions, ''customer; commodity customer'' in regulation 1.3(k) and ''option customer'' in regulation 1.3(jj), and by adding swaps to the proposed definition. Therefore, the proposed definition included swap customers, commodity customers, and option customers, referring to them all with the single term, ''customer.'' Furthermore, the Commission proposed to revise all references to ''commodity customer'' and ''option customer'' throughout the Commission's regulations, but particularly in part 1, to simply refer to ''customer.'' [19] The proposed revisions retained references to requirements specific to certain contracts.[20] Today's final rulemaking revises the definition of ''customer'' (regulation 1.3(k)), as proposed, and deletes the definition of ''option customer'' (regulation 1.3(jj)), as proposed. The Commission did not receive comments about the proposed deletion of the term ''option customer.''

ETA commented that counterparties to electricity swap contracts are not customers analogous to futures customers, and, therefore, by expanding the ''customer'' concept to include entities that execute swaps, the Commission would impose ''significant and inappropriate obligations'' on swap counterparties. The Commission has decided to finalize the definition of customer, as proposed. ETA is correct that counterparties to bilaterally-executed swaps are principals, which is unlike trading futures, where FCMs are agents of their customers. However, FCMs will execute and clear swap transactions, as agents, equivalently to the manner in which they currently execute and clear futures transactions.

The Commission proposed to define the term ''confirmation'' to reflect its differing use in various regulations depending on whether a transaction is executed by an FCM, IB or CTA on the one hand, or by an SD or MSP on the other hand. In the first case, the registrant is acting as an agent. In the second, it is acting as a principal.[21] No commenters addressed the proposed definition of ''confirmation,'' and the Commission has decided to adopt it as proposed.

The Commission proposed to add to regulation 1.3 a definition of the term ''registered entity,'' currently provided in CEA section 1a(40), as revised by the Dodd-Frank Act. The proposed definition of ''registered entity'' is identical to its CEA counterpart and would include DCOs, DCMs, SEFs, swap data repositories (''SDRs'') and certain electronic trading facilities. To correspond with this new definition, the Commission also proposed to replace the current ''Member of a contract market'' definition with a new definition of ''Member,'' in regulation 1.3(q), which would be nearly identical to the ''Member of a registered entity'' definition provided in CEA section 1a(34), also as revised by the Dodd-Frank Act.[22] The proposed ''Member'' definition was broadened to accommodate newly established SEFs, and it includes those ''owning or holding membership in, or admitted to membership representation on, the registered entity; or having trading privileges on the registered entity.'' Additionally, for ease of reference, proposed regulation 1.3 added several terms defined under the CEA, using identical definitions, including ''electronic trading facility,'' ''organized exchange,'' and ''trading facility.''

The ETA commented that the Commission should wait to define ''registered entity,'' ''organized exchange,'' ''electronic trading facility,'' and ''trading facility'' until the Commission enters into an MOU with FERC and publishes rules defining the scope of its jurisdiction over nonfinancial energy commodity swaps. According to the ETA, a SEF should not be deemed a registered entity. In addition, the ETA does not believe SEF participants should fall within the Commission's proposed definition of ''member,'' suggesting that it is inappropriate or premature to require SEF participants to have the same recordkeeping requirements as DCM members under regulation 1.35.

The Commission disagrees with the ETA's comment that it should wait to define the terms ''registered entity,'' ''organized exchange,'' ''electronic trading facility'' and ''trading facility'' until the Commission enters into an MOU with FERC and publishes rules defining the scope of its jurisdiction

[18] Requirements for DCOs, DCMs, and SEFs Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010); *and* Governance Requirements for DCOs, DCMs, and SEFs; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 FR 722 (Jan. 6, 2011).

[19] The Commission proposed to remove references to commodity customers and option customers, replacing them with references to simply ''customer,'' in the following regulations: 17 CFR 1.3, 1.20–1.24, 1.26, 1.27, 1.30, 1.32–1.34, 1.35–1.37, 1.46, 1.57, 1.59, 155.3, 155.4, and 166.5.

[20] For example, proposed regulation 1.33 (Monthly and confirmation statements) required an FCM to document a customer's positions in futures contracts differently from its option or swap positions. Proposed regulation 1.33 preserved these distinctions, even though it referred only to ''customers'' as opposed to ''commodity customers,'' ''option customers,'' and ''swap customers.''

[21] A single entity could be registered in more than one capacity, for example, as both an SD and a CTA. Which rules were applicable would depend on the capacity in which such an entity was performing a particular function.

[22] In accordance with the removal of DTEF references from many other Commission regulations, the proposed ''Member'' definition would not include DTEF references currently in the definition of ''Member of a registered entity'' found in CEA section 1a(34). *See* 7 U.S.C. 1a(34).

over nonfinancial energy commodity swaps. As explained in the Proposal, the definitions proposed for each of those terms are identical to their statutory definitions under the CEA. The Commission may further define these terms in the future if necessitated by an MOU with FERC or by Commission rules defining the scope of its jurisdiction over nonfinancial energy commodity swaps.

With respect to the ETA's assertion that SEFs should not be deemed ''registered entities,'' the Commission notes that SEFs are already deemed ''registered entities'' under section 1a(40) of the CEA. Lastly, the term ''member,'' as defined under the CEA, includes ''with respect to a registered entity * * * an individual, association, partnership, corporation or trust * * * having trading privileges on the registered entity.'' [23] Accordingly, the CEA considers participants on a SEF ''members'' by virtue of their having trading privileges on the SEF. For the foregoing reasons, the Commission is adopting the definitions of ''registered entity,'' ''organized exchange,'' ''electronic trading facility,'' ''trading facility,'' and ''member'' as proposed.

The Commission also proposed to add a definition of the term ''order.'' This term had not previously been defined by Commission regulations, although it is used in several of them, *e.g.,* 17 CFR 1.35, 155.3, and 155.4. In light of this, and with the addition of new categories of registrants (SDs and MSPs) who act as principals rather than agents, clarification of this term is appropriate. No commenters addressed the proposed definition, and the Commission is adopting it as proposed.

Because proposed amendments to regulation 1.31 incorporated the term ''prudential regulator,'' as added to the CEA by the Dodd-Frank Act, the Commission proposed to define the term in regulation 1.3.[24] The proposed definition of ''prudential regulator'' in regulation 1.3 is coextensive with the definition in section 1a(39) of the Act and lists the various prudential regulators. No commenters addressed this proposed definition, but the amendments to regulation 1.31 adopted today no longer reference the term ''prudential regulator.'' Nonetheless, the Commission has determined to adopt the definition as proposed, in anticipation of future rulemakings and regulations possibly using the term ''prudential regulator.''

The Commission also proposed to add the term ''registrant'' to regulation 1.3 so that certain regulations in part 1 could refer to various intermediaries (*e.g.,* FCMs, IBs, CPOs), their employees (associated persons), and other registrants (MSPs). Because the DFA created a definition of and several Commission regulations refer to ''associated persons of swap dealers or major swap participants,'' the Commission proposed to add that term to regulation 1.3 as well. No commenters addressed these changes, but the Commission will only be adopting the definition of ''registrant'' as proposed. Since the Proposal's publication, a separate final rulemaking establishing the registration process for SDs and MSPs amended the existing definition of ''associated person'' found in regulation 1.3(aa) to incorporate associated persons of SDs and MSPs in a manner consistent with CEA section 1a, as amended by the Dodd-Frank Act.[25] In light of that rulemaking, the Commission is not adopting a separate definition of ''associated person of swap dealers and major swap participants'' in regulation 1.3.

The Commission also proposed, and is hereby adopting, a definition of the term ''retail forex customer'' in regulation 1.3 because it appears in several regulations in part 1 and currently is only defined in part 5. The definition is identical in all material respects to the definition of this term as it currently appears in regulation 5.1(k).[26] The Commission did not receive any comments to the Proposal's addition of a definition of ''retail forex customer'' to regulation 1.3.

The Commission is also finalizing the revised definition of ''strike price'' (regulation 1.3(kk)) as proposed so that this definition encompasses swaps in addition to futures. The Commission received no comments about this proposal.

c. Regulation 1.3(t): Open Contract

The Proposal changed the defined term from ''open contract'' to ''open position'' and added provisions for commodity option transactions and swaps. CME commented that it is unclear whether the proposed definition is intended to cover options on swaps. If so, then the word ''commodity'' should be deleted from the phrase, ''commodity option transaction.'' According to CME's comment letter to the Proposal, the Commission should also clarify whether, or which, options are covered by proposed paragraph (t)(3) (swaps). CME also argues that proposed paragraph (t)(3) does not adequately characterize open positions in cleared swaps. Proposed paragraph (t)(1)'s terminology, CME believes, more appropriately characterizes cleared swaps because, like futures, cleared swaps may be fulfilled by delivery or they may be offset.

The Commission has decided to finalize the definition with a few modifications. The final definition retains the original title of the term, ''open contract.'' It also narrows its applicability from all swaps to only Cleared Swaps, as regulation 22.1 defines that term.[27]

The Commission notes that the option component of the definition (paragraph (t)(2)) covers all options: *i.e.,* options on futures; options on swaps (''swaptions''); and options on commodities.[28] In response to CME's comment, the Commission notes that although, pursuant to the Dodd-Frank Act, swaptions and options on commodities (other than options on futures) are swaps, it is nevertheless appropriate for the definition of ''open contract'' to describe them with language suitable only to options and not to other swaps. In other words, the definition of ''open contract'' merely describes types of contracts; it is not intended to classify these contracts for regulatory purposes or to elaborate on the definition of ''swap,'' which the Commission recently published in final form.[29]

Because the only references in the regulations to the term ''open contracts'' apply to cleared contracts, *i.e.* futures contracts and Cleared Swaps, the final definition only includes Cleared Swaps in paragraph (t)(3). The final rule also

[23] CEA section 1a(34), 7 U.S.C. 1a(34).

[24] Proposing Release, 76 FR at 33068 and 33070. Pursuant to proposed regulation 1.31, records of swap transactions must be presented, upon request, to ''any applicable prudential regulator as that term is defined in section 1a(39) of the Act.'' *Id.* at 33088.

[25] Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2615 and 2625 (Jan. 19, 2012).

[26] 17 CFR 5.1(k) currently defines ''retail forex customer'' as ''a person, other than an eligible contract participant as defined in section 1a(12) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.'' This final rulemaking amends the definition in part 5 only to reflect the renumbering of section 1a of the CEA by the Dodd-Frank Act, and adds an identically amended definition to regulation 1.3. *See infra* Part II.G.2.

[27] Regulation 22.1 was promulgated as part of Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012).

[28] Section 4c of the CEA grants the Commission authority over all three of these categories of options.

[29] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (Aug. 13, 2012).

modifies paragraph (t)(3) to reflect the fact that Cleared Swaps can be fulfilled by delivery or by offset against other Cleared Swaps, as is the case with futures. Thus, paragraph (t)(3) states in final form, ''swaps that have not been fulfilled by delivery; not offset; not expired; and not been terminated.''

In the Proposal, pursuant to the revision of the definition of ''open contract'' in regulation 1.3(t), the Commission proposed to change ''open contract'' to ''open position'' in regulations 1.33 (''Monthly and confirmation statements'') and 1.34 (''Monthly record, 'point balance' ''). The Commission did not receive comments about these changes. In light of the fact that the Commission is retaining the title ''open contract,'' in the final revisions to regulation 1.3(t), the Commission is preserving those references to ''open contract'' in regulations 1.33 and 1.34.[30]

d. Regulation 1.3(ll): Physical

i. Proposal

As part of the Proposal, the Commission explained that current regulation 1.3(ll) defines ''physical'' as ''any good, article, service, right or interest upon which a commodity option may be traded in accordance with the Act and these regulations.'' [31] The Commission noted that, other than the reference to options, the term ''physical'' was similar to the definition of ''commodity'' in regulation 1.3(e), which includes, in relevant part ''all * * * goods and articles * * * and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.'' The quoted portions of the ''physical'' and ''commodity'' definitions are effectively the same, differing only in the potential overlying instrument with respect to which the respective terms are defined. In addition, the Commission noted that the introductory language in regulation 1.3 provides that ''[t]he following terms, as used in the rules and regulations of this chapter, shall have the meaning hereby assigned to them, unless the context otherwise requires.'' [32]

In the Proposal, the Commission also traced the history of the term ''physical'' in its regulations, noting that the definition of ''physical'' was first added to its regulations ''to enable trading, on DCMs, in options to buy or sell an underlying commodity'' and that the definition had not been substantively amended.[33] The Commission added that, in 1982, when the Commission proposed to add the definition of ''physical'' to its regulations, ''cash-settled futures on non-physical commodities had just been introduced in the form of the Chicago Mercantile Exchange's Eurodollar futures'' and that, ''[i]n that context * * * it made sense to name such options based on physical commodities, which constituted the vast majority of commodities covered by then-existing futures contracts.'' [34] While options may have primarily been written on physical commodities in 1982, the Commission noted in the Proposal that ''[a]t present * * * options may be traded on both physically deliverable and non-physically deliverable commodities, such as interest rates and temperatures'' and that, given that change, using the term ''physical'' to refer to an option on both physically deliverable and non-physically deliverable commodities may be confusing.[35] The Commission added that the intended-to-be-physically-settled element of the forward exclusion from the swap definition ''would be meaningless if 'physical' included non-physical.'' [36]

In light of (1) The overlapping definitions of ''commodity'' and ''physical'' in Commission regulation 1.3, (2) the fact that options now are written on a wide range of non-physical commodities, and (3) the Commission's desire that the term ''physical'' not be interpreted to permit cash settled transactions to rely on the forward exclusion from the swap definition (unless otherwise permitted by Commission interpretations with respect to such exclusion, such as those discussed in the Commission's rulemaking jointly (with the Securities and Exchange Commission) further defining ''swap''), the Commission, in the Proposal, requested comment on various possible approaches to the definition of ''physical'' in regulation 1.3(ll). One possible approach on which the Commission requested comment was whether it should eliminate the definition, on the theory that its meaning is self-evident, and rely on the ability of interested parties to interpret the term ''physical.'' The Commission also requested comment on not amending the definition in reliance upon the introductory language in regulation 1.3, which applies the regulation 1.3(ll) definition of ''physical'' unless the context otherwise requires.

ii. Comments

Three commenters addressed the definition of physical in regulation 1.3(ll). The ETA commented that the proposed definition of ''physical'' should be withdrawn because addressing it in terms of swaps is premature prior to the Commission publishing the further definition of ''swap,'' including, in particular, defining the term ''nonfinancial commodity,'' which the ETA characterized as a key component of the forward exclusion from the swap definition. The ETA stated that, in proposing such a substantive rule, the Commission must explain how defining ''physical'' would affect all of its regulations and requested that the Commission re-propose any revised definition of ''physical'' with a ''comprehensive analysis of the way such word, whether used as an adjective or an adverb, interrelates with the Dodd-Frank statutory term 'nonfinancial commodity,' as well as the concepts of 'cash market,' 'physical market channels' and the 'bona fide hedging exemption'.''

The Environmental Markets Association (''EMA'') believes that the ''very broad'' definition of the word ''physical'' in current Commission regulations ''certainly'' encompasses environmental commodities, which the EMA states are subject to the forward exclusion from the definition of swap. The EMA requested that the CFTC issue a final rule clarifying that environmental commodities are not swaps even though intangible, that they are nonfinancial commodities that can rely on the forward exclusion, and that intangibility of a commodity does not prevent it from being ''physically settled.'' The Coalition for Emission Reduction Policy (''CERP'') similarly argued that environmental and other intangible commodity transactions that result in actual delivery of a commodity, intangible or not, as opposed to transactions that settle in cash, can be subject to the forward exclusion because such transactions can be physically settled. CERP also claimed that the Commission's proposed interpretation of forward contracts in nonfinancial commodities in the definition of ''swap'' supports its interpretation of ''physically settled'' in that forward sales of environmental commodities are commercial merchandising transactions because both buyer and seller ultimately need and intend the transfer of ownership of the emission allowances or offset credits.

[30] *See infra* section II.A.4. (discussing amendments to regulation 1.33).

[31] Proposing Release, 76 FR at 33068–69.

[32] *Id.* at 33069.

[33] *Id.* at 33069.

[34] *Id.*

[35] *Id.*

[36] *Id.*

EMA also expressed that the Commission's request for comment with regard to whether the definition of ''physical'' should rely on the ''common sense meaning'' of the word was unclear. In particular, EMA argued that environmental commodities traded in the spot or forward markets are physically delivered via a registry or an exchange of paperwork and eventually consumed through retirement. Further, according to EMA, environmental commodities are goods because Uniform Commercial Code (''UCC'') section 2105(1) defines ''good'' as ''anything that can be moved other than money.''

iii. Final Rules

The Commission is removing from regulation 1.3(ll) the definition of ''physical,'' which term will therefore have the meaning dictated by the context of the individual Commission regulations in which it appears. In addition, the Commission is adopting conforming changes to other regulations to address the deletion of the definition. The Commission is adopting these changes for ease of reference for market participants and to reduce confusion in interpreting the Commission's regulations, consistent with the spirit of Executive Order 13563, which seeks, among other goals, to eliminate agency regulations that have outlived their usefulness.[37] As explained further below, these modifications are not intended to alter the substantive provisions of the Commission's regulations.

When the Commission added the definition of ''physical'' to regulation 1.3 in 1982, the intent was to distinguish between options on futures contracts and other options subject to the Commission's jurisdiction; the Commission termed such other options ''options on physicals.'' The Commission added the ''physical'' definition because, while the 1982 rulemaking including provisions applicable both to DCM-listed options on futures and DCM-listed options on commodities, it also contained regulations applicable solely to options on futures. Thus, the purpose of the definition was ''principally to enable the Commission to differentiate, where necessary, between references to options on physicals and options on futures contracts.'' [38] Although the intent of Commission regulation 1.3(ll) was only to address the distinction between options on futures and other options, the Commission believes that the use of such a broad term to apply to a narrow circumstance can create confusion because the definition is not expressly so limited. While the introduction to regulation 1.3 says that the definitions therein have the meanings set forth therein unless the context otherwise requires, determining when regulation 1.3(ll) applies as drafted and when the context dictates a different meaning can be subjective and result in confusion.

The Commission did not intend, when it promulgated the definition in regulation 1.3(ll), to apply it to circumstances such as the definition of ''physically'' settled. Given the intent of the definition of the term ''physical'' (to distinguish options on futures from other options) and the introductory language in regulation 1.3 regarding contextual interpretations of the defined terms therein, in regulations where it is not necessary to distinguish between different types of options, the definition of ''physical'' in Commission regulation 1.3(ll) is not useful and can be overbroad. For example, the definition of ''physical'' is not useful with respect to the term ''physical safeguards'' in regulation 160.30, which pertains to procedures to safeguard customer records and information. Because the scope of the definition of ''physical'' essentially includes options on any commodity, which would include non-physical commodities such as temperatures and interest rates, effectively, the restriction that ''physical'' in regulation 1.3(ll) is limited to any goods, article, service, right or interest upon which a commodity may be traded in accordance with the CEA and the Commission's regulations is not much of a restriction at all.

The Commission also notes that it recently promulgated final and interim final rules amending parts 32 and 33 of the Commission's regulations.[39] While part 33 continues to address options on futures contracts, the other options subject to the Commission's jurisdiction that also were previously addressed in part 33 now are addressed in part 32 rather than in part 33. Further, the Commission no longer refers to such other options as ''options on physicals.'' Instead, the Commission generally uses the term ''commodity option'' as a reference to both options on futures and other CFTC-jurisdictional options. Where the Commission distinguishes the regulatory treatment for options on futures from the regulatory treatment of other options, it specifically identifies options on futures as ''commodity option transactions on a contract of sale of a commodity for future delivery.'' With these recent amendments, the definition of ''physical'' in regulation 1.3(ll) will not help to distinguish between options on futures and other commodity options because the rules generally addressing the regulatory treatment of other commodity options no longer use the term ''physical'' to refer to such transactions.

In light of these considerations, the Commission believes that deleting the definition of physical will reduce the potential for confusion on the part of market participants, as the appropriate definition of that term will be based on the context of the individual rules in which the term is utilized. These amendments will also serve the goals of Executive Order 13563 by amending the Commission's regulations because they no longer are ''effective[] in achieving the objectives for which they were adopted.'' [40]

Further, various Commission regulations relating to options also refer to a ''physical'' when discussing an option on a commodity. In order to conform those regulations with the adapting changes discussed above, the Commission is adopting a number of non-substantive changes including, but not limited to, replacing certain references to ''physical'' with references to ''commodity.'' Where appropriate, the Commission is also replacing references to ''underlying physical'' with references to ''underlying commodity.''

For the reasons discussed above, these conforming amendments will not result in substantive changes. Therefore, the Commission is amending the following regulations as described above: Regulations 1.3(kk); 1.3(ll); 1.17(c)(1)(iii), (c)(5)(ii)(A), and (c)(5)(xiii)(C); 1.33; 1.34(b); 1.35(b)(2)(iii), (b)(3), (d) and (e); 1.39(a) and (a)(3); 1.46(a)(1)(iii) and (iv); 4.23(a) and (b); 4.33(b)(1); 15.00(p)(1)(ii); 16.00(a); and 16.01(a)(1)(ii) and (iv), and (b)(1)(ii) and (iv). The Commission is leaving unchanged other references to ''physical'' in its existing definitions because, given the context in which the term is used in those rules, such

[37] *See* Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, at section 6(a), 76 FR 3821, 3822 (Jan. 21, 2011) (stating ''To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'').

[38] Domestic Exchange-Traded Commodity Options; Expansion of Pilot Program To Include Options on Physicals, 47 FR 56996, 56998 (Dec. 22, 1982).

[39] Commodity Options, 77 FR 25320 (Apr. 27, 2012).

[40] Reducing Regulatory Burden; Retrospective Review Under E.O. 13563, 76 FR 38328 (June 30, 2011).

references are limited to physical commodities.

The Commission is replacing the word ''physical'' in regulations 1.17(c)(1)(iii) and 1.17(c)(5)(xi) with the word ''commodity,'' and is replacing the word ''physical'' in regulation 1.17(c)(5)(ii)(A) with the term ''physical commodity.'' In so doing, the Commission does not intend to change the meaning of any of these paragraphs. Thus, final regulations 1.17(c)(1)(iii) and 1.17(c)(5)(xi) will continue to apply to options that overly any commodity, not just a tangible commodity. By contrast, final regulation 1.17(c)(5)(ii)(A) will continue to apply to the options described therein, which cover tangible commodities only.

While some commenters requested that the Commission interpret ''physical'' for purposes of the term ''physically settled'' within the forward exclusion for swaps, or generally address the definition of ''physical'' as it relates to other terms, the Commission declines to do so for purposes of this release. The conforming amendments to the definition of physical are non-substantive changes that are designed to increase clarity for market participants. As noted above, rather than have a definition of physical that applies unless the context ''otherwise requires,'' the Commission will apply the definition based on the particular context of the applicable regulation. Because the current definition already applies in this manner, the modifications addressed herein do not amount to a substantive change in the regulations.

e. Regulation 1.3(ss): Foreign Board of Trade

The Commission proposed to amend the definition of foreign board of trade to mean ''any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated where foreign futures, foreign options, or foreign swap transactions are entered into.'' The Commission received no comments regarding the proposed definition of ''foreign board of trade'' and is modifying the proposed definition to make it consistent with the definition provided in the final rulemaking for Registration of Foreign Boards of Trade.[41] Accordingly, new regulation 1.3(ss) defines the term ''foreign board of trade'' as ''any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated.''

f. Regulation 1.3(yy): Commodity Interest

The Commission proposed adding ''swap'' to the definition of ''commodity interest'' in regulation 1.3(yy).[42] Currently, commodity interest is defined as: ''(1) Any contract for the purchase or sale of a commodity for future delivery; (2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act; and (3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act.'' At the time of the proposal, the term was cross-referenced by 33 other Commission regulations and appendices to parts of Commission regulations.[43] Generally, the term ''commodity interest'' is meant to encompass all agreements, contracts and transactions within the Commission's jurisdiction, though not all such agreements, contracts and transactions are expressly set forth therein.[44]

The Dodd-Frank Act added a definition of the term ''swap'' to the CEA.[45] DFA section 712(d)(1) requires the Commission to further define the term ''swap'' jointly with the Securities and Exchange Commission (''SEC''), and the Commission has recently adopted regulations further defining the term ''swap,'' among other terms, jointly with the SEC.[46]

In their comment letter, the ETA objected to the Proposal's addition of the term ''swap'' to the definition of commodity interest because, as discussed on page 6, above, the ETA objected to the manner in which the Proposal analogized swaps to futures. The Commission believes it is appropriate to add ''swap'' to the definition of commodity interest because the Dodd-Frank Act amended various intermediary definitions in section 1a of the Act (the Dodd-Frank Act updated the definitions of CPO, CTA, FCM, IB, Floor Trader and Floor Broker) to include their use of swaps. For example, the Act's present definition of FCM, as amended by the Dodd-Frank Act, authorizes this intermediary to accept customer orders for ''swaps'' in addition to accepting customer orders for ''the purchase or sale of any commodity for future delivery.'' If the Commission did not update the definition of ''commodity interest'' to include swaps, then various regulations applicable to intermediaries using the term ''commodity interest'' would not apply to intermediaries' swap activities. The Commission has reviewed all uses of the term ''commodity interest'' throughout the regulations and believes they appropriately refer to both futures and swaps.

Thus, the Commission has decided to finalize a revised definition of ''commodity interest'' by adding paragraph (yy)(4) to include swaps. The final version adopted today makes only minor changes to the proposed paragraph. Whereas the proposed paragraph referenced ''any swap as defined in the Act, the Commission's regulations, a Commission order or interpretation, or a joint interpretation or order issued by the Commission and the [SEC],'' amended regulation 1.3(yy)(4) now states ''any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.'' The Commission is making this change because, for the purposes of the definition of ''commodity interest,'' it does not matter whether the Commission defines a swap pursuant to an order, interpretation, or joint interpretation.

g. Regulation 1.3(z): Bona Fide Hedging Transactions and Positions

The Proposal made technical amendments to this definition by omitting references to regulations 1.47 and 1.48 because the proposed rule on Position Limits deleted those regulations[47] and omitting references to ''option customers'' on account of this rulemaking's deletion of that term. The Commission is not promulgating these amendments in this rulemaking because the final rule on Position Limits has already extensively revised regulation

[41] Registration of Foreign Boards of Trade, 76 FR 80674 (Dec. 23, 2011).

[42] Proposing Release, 76 FR at 33069.

[43] *See* 17 CFR 1.12, 1.56, 1.59, 3.10, 3.12, 3.21, 4.6, 4.7, 4.10, 4.12–4.14, 4.22–4.25, 4.30–4.34, 4.36, 4.41, 30.3, 160.3–160.5, and 166.1–166.3; 17 CFR pt. 3 app. B, 17 CFR pt. 4 app. A, and 17 CFR pt. 190 app. B.

[44] For example, the term ''contract for the purchase or sale of a commodity for future delivery'' in current regulation 1.3(yy)(1) encompasses security futures products. Similarly, the term ''swap'' would include mixed swaps (though mixed swaps are swaps, they also are security-based swaps, so the Commission shares authority over mixed swaps with the SEC). Of course, the impact of the scope of proposed regulation 1.3(yy) is only as extensive as the other regulations referencing it.

[45] DFA section 721(a)(21); codified at 7 U.S.C. 1a(47).

[46] Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (August 13, 2012) (adopting 17 CFR 1.3(xxx), which defines the term ''Swap'').

[47] Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011).

1.3(z).[48] Mr. Chris Barnard commented that the definition of ''bona fide hedging transactions and positions'' should be amended to state that such transactions ''are not held for a purpose that is in the nature of speculation or trading'' and ''not held to hedge or mitigate the risk of another position, unless that other position itself is held for the purpose of reducing risk.'' Mr. Barnard commented further that the determination of whether a transaction meets the definition should be made at the time the transaction is entered into, considering the circumstances existing at that time. The Commission has decided not to amend regulation 1.3(z) pursuant to these comments, which address substantive issues that are beyond the scope of this rulemaking.

h. Lack of a Definition of ''End-User'' in Regulation 1.3

The ETA requested that the Commission, the SEC, and prudential regulators agree on a definition of ''end-user'' because the DFA does not define this term and regulators have used the term inconsistently. The Proposal did not add a definition of ''end-user'' to regulation 1.3 because the DFA did not add a definition of that term to CEA section 1a. The Proposal's intention was to conform the Commission's regulations to the DFA's revisions to the CEA.

The Commission has decided not to add a definition of ''end-user.'' The Commission has no reason to define ''end-user'' because the Commission's regulations do not use this term, and even the recently adopted Commission regulations implementing the CEA's end-user exception to clearing do not define it.[49] The issue of whether the Commission's regulations should use the term ''end-user'' is beyond the scope of this final rulemaking.

2. Regulation 1.4: Use of Electronic Signatures

The Commission proposed to revise regulation 1.4 to extend the benefit of electronic signatures and other electronic actions to SDs and MSPs. Section 731 of the Dodd-Frank Act amended the CEA by adding new section 4s(i)(1), requiring SDs and MSPs to ''conform with such standards as may be prescribed by the Commission by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps,'' [50] and adding new section 4s(i)(2), requiring the Commission to adopt rules ''governing documentation standards for swap dealers and major swap participants.'' [51]

Pursuant to the foregoing authority, the Commission has adopted new regulation 23.501(a)(1), which requires ''[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is a swap dealer or major swap participant [to] execute a confirmation for the swap transaction,'' according to a specified schedule.[52] Also pursuant to the foregoing authority, the Commission has adopted a new regulation 23.501(a)(2), which requires ''[e]ach swap dealer and major swap participant entering into a swap transaction with a counterparty that is not a swap dealer or a major swap participant [to] send an acknowledgment of such swap transaction'' according to a specified schedule.[53] Regulation 23.500(a) defines such an ''acknowledgment'' as ''a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.'' [54] In proposing the confirmation and acknowledgment rules, the Commission explained that ''[w]hen one party acknowledges the terms of a swap and its counterparty verifies it, the result is the issuance of a confirmation.'' [55]

Regulation 1.4 currently provides that an FCM, IB, CPO and CTA receiving an electronically signed document is in compliance with Commission regulations requiring signed documents, provided that such entity generally accepts electronic signatures.[56] The rationale for allowing the existing entities listed in regulation 1.4 to use electronic signatures (*i.e.,* ''[a]s part of [the Commission's] ongoing efforts to facilitate the use of electronic technology and media'') [57] applies equally to SDs and MSPs. No commenters addressed the amendments to regulation 1.4, and the Commission is adopting them as proposed. Therefore, the Commission is hereby adding SDs and MSPs to the list of entities covered by regulation 1.4 and amending its structure to account for the provisions of the Commission's confirmation and acknowledgement obligations discussed above.[58]

3. Regulation 1.31: Books and Records; Keeping and Inspection

a. Record Retention Period and Inspection

To conform the existing recordkeeping requirements under regulation 1.31 to the recordkeeping requirements under proposed regulation 23.203(b) for SDs and MSPs relating to their swap transactions, the Commission proposed to amend regulation 1.31 to require that records of a swap transaction or related cash or forward transaction, including records of oral communications, be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for five years after such date.[59]

CME suggested that conversations should only have to be retained for six months after the execution of a transaction. FIA commented that the Commission failed to provide a justification for requiring that a swap record be maintained for the life of the swap plus five years. Encana requested clarification that regulation 1.31 does not apply to a non-financial end-user who enters into swaps, but is not an FCM, IB, or member of a DCM or SEF. Encana also made a general request that the Commission specify in its final rules which recordkeeping and reporting rules apply to non-financial end-users.

In contrast to other commenters, Mr. Chris Barnard asserted that all records should be kept indefinitely and scanned after two years, arguing that there is no technological or practical reason to limit the record retention period. Mr. Barnard specifically commented that records of voice communications also should be

[48] Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011).

[49] Recently adopted regulation 39.6 establishes the end-user exception to clearing by defining which parties are eligible to opt out of the clearing requirement pursuant to section 2(h)(7) of the CEA, as amended by the DFA. *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (July 19, 2012).

[50] 7 U.S.C. 6s(i)(1).

[51] 7 U.S.C. 6s(i)(2).

[52] Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55961 (September 11, 2012).

[53] *Id.*

[54] *Id.*

[55] Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519, 81522 (Dec. 28, 2010).

[56] 17 CFR 1.4. The regulation also requires that the signatures in question comply with applicable Federal laws and Commission regulations, and requires the relevant entity to employ reasonable safeguards regarding the use of electronic signatures, including safeguards against alteration of the record of the electronic signature. *Id.*

[57] Use of Electronic Signatures by Customers, Participants and Clients of Registrants, 64 FR 47151 (Aug. 30, 1999).

[58] This includes revision to the title of regulation 1.4 to reflect these changes. Regulation 1.4, as amended by this release, is entitled ''Use of electronic signatures, acknowledgments and verifications.''

[59] Certain proposed amendments to § 1.35 (regarding recording of communications), and related amendments to § 1.31, are not addressed in this final rule. The Commission intends to address these amendments in a final rule in a separate **Federal Register** release.

kept indefinitely. To support the asserted usefulness of such records, Mr. Barnard cited a 2009 IOSCO report stating that telephone records could benefit enforcement investigations.[60]

The Commission also proposed to amend regulation 1.31 to conform to the proposed regulation 23.203(b)(2) requirement for SDs and MSPs and their swap transactions by proposing to require that all records kept pursuant to the Act or the Commission's regulations be made available for inspection to any applicable prudential regulator, as that term is defined in section 1a(39) of the Act, or, in connection with security-based swap agreements described in section 1a(47)(A)(v) of the Act, the SEC. By contrast, existing regulation 1.31, which pertains to ''all books and records required to be kept by the Act or by these regulations,'' requires that records be kept for five years and be made available only to the Commission and the Department of Justice.[61] The Commission did not receive comment on this proposed revision.

b. Final Rule

The Commission has determined to adopt the proposed revision to regulation 1.31 regarding record retention periods with two modifications. First, in final regulation 1.31, the retention period for records of oral communications leading to the execution of a swap or related cash or forward transaction, as required of SDs and MSPs under regulation 23.202(a)(1) and (b)1), respectively, will be one year (rather than five years after the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, as proposed). This modification is consistent with the final provision for an SD's or MSP's oral communications under new regulation 23.203(b)(2) in the Reporting, Recordkeeping, and Daily Trading Record Requirements final rulemaking.[62] The Commission believes that this retention period for SDs and MSPs with respect to records of oral communications leading to the execution of a swap or related cash or forward transaction will enable it to adequately execute its enforcement responsibilities under the Act and these regulations while minimizing the storage costs imposed on these affected entities.[63]

With respect to Encana's request for clarification concerning the applicability of regulation 1.31 to commercial end-users, regulation 1.31 applies to all records required to be kept by the Act or the Commission's regulations, for example, records required to be kept under regulations 1.35, 18.05 and 23.202. If these rules require end-users to keep records (*e.g.,* regulation 18.05, Maintenance of Books and Records), then those records must be kept in accordance with regulation 1.31.

In response to CME's comment that although the Commission suggests that the retention period for swaps applies only to SDs and MSPs, as addressed in proposed regulation 23.203(b), the proposed amendment to regulation 1.31 is ambiguous in that it could be read to apply to all entities, the Commission clarifies that the final provision in regulation 1.31 regarding the retention period for records of swap transactions is triggered by the type of record and not the entity that is required to keep the record. Therefore, although regulation 23.203(b) only applies to SDs and MSPs with regard to their swap transactions, the final corresponding provision in regulation 1.31 applies to anyone who is required by the Act or by these regulations to keep records of, among other things, swap transactions.[64]

Second, the Commission also has determined not to adopt the proposed revisions to regulation 1.31(a)(1), (b)(2)(ii), (b)(2)(v)(B), (b)(3)(i), (b)(3)(ii)(C), (b)(3)(iii)(A), and (b)(4)(i) regarding the parties to whom documents must be made available for inspection. The proposed revisions were intended to require only SDs and MSPs to make the records that the CEA or the Commission's regulations require them to maintain available for inspection to, in addition to the Commission and DOJ, any applicable prudential regulator (and, in the case of security-based swap agreement records, to the SEC). However, as drafted, the proposed regulation text would have applied to all persons covered by regulation 1.31, not just to SDs and MSPs. The Commission's final swap recordkeeping rules require SDs and MSPs to make the records that the CEA or the Commission's regulations require them to maintain available for inspection to, in addition to the Commission and DOJ, any applicable prudential regulator or, in the case of security-based swap agreements, to the SEC, capturing the intent of the proposed revisions to regulation 1.31(a)(1), (b)(2)(ii), (b)(2)(v)(B), (b)(3)(i), (b)(3)(ii)(C), (b)(3)(iii)(A), and (b)(4)(i).[65] Therefore, those proposed revisions have become superfluous. Consequently, the final rule provides that, instead of having to make records available for inspection to the Commission, the Department of Justice, any applicable prudential regulator or, in the case of security-based swap agreements, to the Securities and Exchange Commission, persons covered by regulation 1.31 will continue to be required to make records available for inspection only to the Commission and the Department of Justice.

c. Format of Retained Records

The Commission also proposed revising regulation 1.31(a)(1), (a)(2), and (b) to require that: all books and records required to be kept by the Act or by the Commission's regulations be kept in their original form (for paper records) or native file format (for electronic records); and production of such records be made in a form specified by the Commission.

CME believes that the native file format requirement should not require the retention of raw, unprocessed data generated or transmitted by an electronic trading or clearing system. Otherwise, CME argued, DCOs and DCMs would have to change the way they retain records. CME stated that its recommendation is not intended to alter the type or format of data that DCOs and DCMs currently capture and store for both business and regulatory purposes. Rather, it asked the Commission to clarify that the ''native file format'' provision does not impose a new or additional recordkeeping requirement on DCOs and DCMs as it relates to their electronic trading or clearing systems.

[60] *http://www.iosco.org/news/pdf/IOSCONEWS137.pdf.*

[61] 17 CFR 1.31(a) (emphasis added).

[62] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20204 (Apr. 3, 2012) (''Provided, however, that records of oral communications communicated by telephone, voicemail, mobile device, or other digital or electronic media pursuant to § 23.202(a)(1) and (b)(1) shall be kept for a period of one year.'').

[63] As noted above, the proposed amendments to regulation 1.35 that would require the recording of certain oral communications by certain entities in addition to SDs and MSPs will be the subject of a separate final release. The Commission will consider any related amendments to regulation 1.31 at that same time.

[64] Until such time as the Commission adopts amendments to regulation 1.35 regarding the recording of oral communications, only SDs and MSPs are required, pursuant to regulation 23.202, to record certain oral communications relating to swap transactions and related cash and forward transactions. However, regulation 1.35, as amended herein, requires certain other entities, in addition to SDs and MSPs, to keep certain records of all transactions relating to their business of dealing in, among other things, swap transactions. As noted in text, regulation 1.31 as amended herein, applies to these records.

[65] 17 CFR 23.203(b).

CME also asked for clarification as to which proposed revisions to regulation 1.31 apply only to swaps. MGEX sought clarification that proposed regulation 1.31 does not require a firm to keep both paper and electronic records concerning the same communications.

CME commented that the original form requirement is confusing and superfluous in light of current regulation 1.31(b), which permits the storage of paper records on microfilm, microfiche, or a similar medium, and that it is not clear what the Commission means by ''native file format.'' Similarly, NFA requested clarification that regulation 1.31(b) would continue to permit firms to retain paper records on micrographic or electronic storage media in lieu of maintaining paper records in their original format. NFA commented that the proposed revisions fail to provide a reason for requiring that electronic records be kept in their native file format.

FIA and NFA believe that existing regulation 1.31 complies with Federal Rule of Civil Procedure 34. Therefore, they asserted, there is no reason for the Commission to require that records be kept in their original form for paper records and native file format for electronic records. FIA and NFA further asserted that there is no reason for the Commission to depart from a rule that was designed, in 1999, to harmonize with the SEC's recordkeeping rules. Similarly, ACSA commented that requiring paper records to be maintained in their original form for five years and be readily accessible for the first two would conflict with SEC rules. FIA commented that firms currently rely on regulation 1.31(b) to transfer electronic records from their original format to new forms of electronic media. CME similarly commented that electronic files often must be migrated, upgraded or converted in order to meet ever-evolving technology standards. Therefore, CME argued that, because some swaps could exist for 30 to 50 years, the technology used to generate or store electronic records related to such swap transactions may become outdated or obsolete in a much shorter period of time. Therefore, CME recommended that the Commission eliminate the requirement to retain swap records in their native file format for the life of the swap.

CME argued that the Commission should re-propose other rules referencing regulation 1.31 (*e.g.,* DCO Core Principles, DCM Core Principles, SEF Core Principles, and SD and MSP Recordkeeping) because the proposed revisions to the form a record must take under regulation 1.31 substantially change the requirements proposed by those rulemakings. In contrast to other comments, the Working Group, in response to the proposed regulation 23.203(b) requiring SDs and MSPs to maintain records in accordance with existing regulation 1.31, asserted that, to be made workable for purposes of complying with the Commission's proposed requirements under regulation 23.203(b), regulation 1.31 should be revised to reflect current technologies and industry practices relating to digitized data storage.[66]

Having considered these comments, the Commission is adopting the revisions to regulation 1.31 regarding the form in which records must be kept as proposed. In 1999, as commenters highlighted, the Commission adopted amendments to the recordkeeping obligations established in regulation 1.31 by, among other things, allowing most categories of records to be stored on either micrographic or electronic storage media for the full five-year maintenance period.[67] The Commission reasserts one of its intentions in undertaking the 1999 update, which was to ''provide recordkeepers with opportunities to reduce costs and improve both the efficiency and security of their recordkeeping systems.'' Thus, the Commission clarifies that recordkeepers will be in compliance with the new requirement to keep paper records in their original form if they continue to store paper records ''on either 'micrographic media' * * * or 'electronic storage media' for the required time period,'' as provided under regulation 1.31(b). However, one of the Commission's other stated goals in amending regulation 1.31 in 1999 was to further the Commission's need for access to complete and accurate records when necessary in a format that the Commission can process, *i.e.,* a usable format.[68] Thus, the Commission is now making clear that paper records are not usable by the Commission as a substitute for the underlying financial data used to create that paper. Therefore, it is necessary that electronic records be maintained in their native file format and not reduced to paper.

Accordingly, for records that include data stored in a database, the ''native file format'' is the format in which the data is maintained in that database, not a format reduced to paper or imaged format, which is essentially the equivalent of paper. This is true regardless of the imaged format, such as portable document format (''PDF''), whether machine-readable through optical character recognition (''OCR'') or any other process. Thus, the underlying financial data from which an FCM creates PDF versions of customer account statements must be kept in its ''native file format'' because, if and when the Commission requests those financial records, it will not be sufficient for the recordkeeper to produce the paper and/or PDF statements. Where the data is used to generate a paper document (including, but not limited to a PDF), such as a customer account statement, the paper document must be maintained in its original form, while the data must be maintained in its native file format.

Specifically regarding records of swap transactions, the Commission has decided to keep the requirement that these records be maintained in their native file format for the life of the swap plus five years. In response to CME's specific concerns about the need to migrate, update or convert electronic files over the potentially long life of a swap to meet evolving technology standards, the Commission confirms that maintaining data in native file format (*i.e.,* the format in which it was originally created or maintained) does not prohibit a recordkeeper from migrating that data from an obsolete or legacy system or database to a new system or database, where it will then be maintained in the native file format of the new system or database. If due to the proprietary nature of the system, it is impossible or impracticable to provide the Commission with the data in its native file format because, for

[66] *See* Letter of Working Group of Commercial Energy Firms, dated February 7, 2011, in response to Notice of Proposed Rulemaking for Reporting, Recordkeeping, and Daily Trading Requirements for Swap Dealers and Major Swap Participants (75 FR 76666, Dec. 9, 2010). The Commission addressed the Working Group's comment in the final rule for SD and MSP recordkeeping requirements stating, ''[t]he Commission believes that The Working Group's concerns about § 1.31 have been addressed by a subsequent rule proposal to amend § 1.31 to reflect current technologies and industry practices related to digitized data storage. If these amendments are finalized, the Commission believes that § 1.31 will be compatible with electronic records in a trading system and other records that do not originate from a written document.'' *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20134 (Apr. 3, 2012).

[67] *See* 64 FR 28735 (May 27, 1999).

[68] In 1999, the Commission stated that, ''[t]he requirement that recordkeepers provide documents to the Commission in one of the many identified formats arises out of practical limitations on the Commission's ability to process data stored in the full range of available formats and coding structures on the full range of storage media available to recordkeepers.'' 64 FR 28735, 28740 (May 27, 1999).

example, the native file format would not be accessible by the Commission, as it may not otherwise have that proprietary system, or the system does not readily export the requested data in native file format, then a recordkeeper may provide the data in a commonly accessible, non-proprietary format.

In the proposed changes to regulation 1.31, the Commission proposed to amend regulation 1.31(b)(3)(i) by replacing ''approved machine-readable media as defined in regulation 15.00(l)'' with ''compatible data processing media as defined in regulation 15.00(d).'' The proposed change was intended to update this paragraph of regulation 1.31 to reflect that regulation 15.00(l) no longer exists and, when it existed, was a definition of ''compatible data processing media'' and not ''machine-readable media.'' [69] Having received no comments on this proposed ministerial change, the Commission has determined to adopt the changes to regulation 1.31(b)(3)(i) as proposed.

In response to CME's request for clarification of the scope of ''native file format,'' the Commission confirms that the definition of ''native file format'' excludes raw, unprocessed data generated or transmitted by an electronic trading or clearing system.

4. Regulation 1.33: Monthly and Confirmation Statements

Regulation 1.33 requires FCMs to maintain certain records and to regularly furnish monthly and confirmation statements to customers regarding commodity futures and option transactions they have entered into on behalf of customers. The DFA amended the definition of FCM in section 1a of the CEA to authorize an FCM to solicit or accept orders for swaps in addition to commodity futures and option transactions.[70] Therefore, the Commission proposed adding requirements for monthly and confirmation statements applicable to swaps. The Commission did not receive comments concerning these amendments and is adopting these provisions mostly as proposed.

The Commission has decided to replace a reference to ''open positions'' in the existing paragraph (a) introductory text with ''open contracts.'' This amendment makes the regulation 1.33(a) introductory text consistent with the Commission's revised definition of ''open contracts'' in regulation 1.3(t).

In finalizing paragraphs (a)(3) and (b)(2), the Commission is replacing proposed references to ''swaps'' with ''Cleared Swaps,'' as regulation 22.1 defines that term. Since the publication of the Proposal, the Commission has finalized part 22 concerning the segregation of ''Cleared Swaps Customer Collateral.'' [71] Because an FCM will only clear those swaps that are ''Cleared Swaps,'' regulation 1.33 should only refer to ''Cleared Swaps.'' For the same reason, the Commission is using the terms ''Cleared Swaps Customer'' and ''Cleared Swaps Customer Collateral,'' as now defined in regulation 1.3. These corrections are being made in conjunction with technical corrections described below, in section II.A.14 (Technical corrections to parts 1 and 22).

Finally, in paragraph (a)(3) of regulation 1.33, the Commission is replacing the phrase ''caused to be executed by'' with ''carried by.'' The reason is that an FCM might not provide a trade execution function for every swap that it clears.

5. Regulation 1.35: Records of Cash Commodity, Futures and Option Transactions [72]

As part of the ministerial amendments contained in this release, the Commission is renumbering portions of regulation 1.35 so that paragraphs currently numbered 1.35(a–1) and 1.35(a–2) will be renumbered 1.35(b) and 1.35(c), respectively. As a result, paragraphs currently numbered 1.35(b), (c), (d) and (e) have been renumbered as 1.35(d), (e), (f) and (g), respectively.

Because amended regulation 1.35 extends recordkeeping obligations to swaps, the Commission has created special language for swaps, where appropriate. In regulation 1.35(d)(2) (formerly (b)(2)) (records of futures, commodity options, and retail forex exchange transactions for each account), the Commission has added paragraph (iv), as proposed. The Commission did not receive comments about this amendment and is adopting it as proposed. Amended regulation 1.35(d)(2)(iv) requires FCMs, IBs, and any clearing members clearing swaps executed on a DCM or SEF to maintain records describing the date, price, quantity, market, commodity, and, if cleared, DCO of each swap.

a. Bunched Orders

The Commission recognizes that investment managers currently execute bunched swap orders on behalf of clients and allocate the trades to individual clients post-execution. The Commission believes that the bunched order procedures currently applicable to futures can be adapted for use in swap trading. Therefore, the Commission proposed amending regulation 1.35(a–1)(5) (redesignated as (b)(5) pursuant to this rulemaking), addressing post-execution allocation of bunched orders.[73] The Commission received one comment letter concerning this topic. The Swaps and Derivatives Market Association (''SDMA'') strongly supported the proposed amendment on the grounds that it would promote operational and execution efficiency in both the cleared and uncleared swaps markets. Specifically, SDMA noted that industry precedent supports the proposed post-execution time limits (for cleared swaps, no later than a time sufficiently before the end of the calendar day the order is executed to ensure that clearing records identify the ultimate customer for each trade; for uncleared swaps, no later than the end of the day the swap was executed). SDMA also noted that regulation 1.35(a–1)(5)'s bunched order provisions for futures provide an appropriate model for swaps and that FCMs generally have sufficient risk control capability (technologically speaking) to allocate swap orders post-execution.

In its final rulemaking concerning Customer Clearing Documentation, Time of Acceptance for Clearing, and Clearing Member Risk Management, the Commission adopted the Proposal's

[69] Under current § 15.00(d), ''Compatible data processing media'' means ''data processing media approved by the Commission or its designee.'' This term has existed under § 15.00 since as early as 1986. See 17 CFR 15.01 (1986). At that time, the definition included a list of what the Commission considered to be compatible data processing media, but deleted those references to specific media in 1997 in response to comments suggesting that a regulatory definition was impractical given the fast pace of evolving technology. *See* 64 FR 28735, 28739 (May 27, 1999) (citing 62 FR 24026, 24028 (May 2, 1997)).

[70] DFA section 721(a)(13). Today's rulemaking similarly incorporates those changes into the corresponding definition of ''futures commission merchant'' in regulation 1.3.

[71] Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012). *See infra* pt. II.A.14 (discussing technical changes to parts 1 and 22).

[72] The Commission proposed to amend regulation 1.35(a) so that FCMs, RFEDs, IBs, and members of a DCM or SEF would be required to record all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of transactions in a commodity interest or cash commodity, however communicated. The proposed amendments to regulation 1.35(a) also included a requirement that each transaction record be maintained in a separate electronic file identifiably by transaction and counterparty. As noted above, the Commission will consider these proposed amendments to regulation 1.35(a) in a separate release.

[73] In the Proposal, the Commission requested comment as to whether it would be appropriate to add FCMs and IBs to the list of eligible account managers. Proposing Release, 76 FR at 33073.

amendments to regulation 1.35(a–1)(5) concerning the post-execution time limits referred to above.[74]

In this rulemaking, the Commission is adding FCMs and IBs to the list of eligible account managers in regulation 1.35(a–1)(5) (redesignated as (b)(5)), as proposed, in order to have a single standard for all intermediaries that might have discretion over customer accounts. Unlike other account managers, however, under regulations 155.3 and 155.4, FCMs and IBs are prohibited from including proprietary trades in a bunched order with customer trades. Accordingly, as proposed, the Commission has added a cross-reference in regulation 1.35(a–1)(5) (re-designated herein as (b)(5)) to those regulations. The Commission did not receive comments to this segment of the Proposal.

The Commission is further amending regulation 1.35(a–1) (redesignated herein as (b)) in order to provide that specific customer account identifiers need not be included in confirmations or acknowledgments provided pursuant to regulation 23.501(a), if the requirements of regulation 1.35(a–1)(5) (redesignated herein as (b)(5)) are met. This will enable account managers to bunch orders for trades executed bilaterally with SDs or MSPs. This will require that, similar to the current procedure for futures, the allocation be completed by the end of the day of execution and provided to the counterparty. The Commission is making this revision as proposed; it did not receive comments to this revision.

Also as proposed, the Commission is deleting appendix C to part 1, which predated regulation 1.35(a–1)(5) (re-designated herein as (b)(5)) and also addresses bunched orders. Appendix C consists of a Commission Interpretation regarding certain account identification requirements pertaining to the practice of combining orders for different accounts into a single order book, referred to as bunched orders. The procedures for bunched orders are set forth in regulation 1.35(a–1)(5) (re-designated herein as (b)(5)). Accordingly, the procedures under appendix C to part 1 are duplicative and no longer necessary. The Commission received no comments concerning its proposal to delete appendix C to part 1 and is hereby deleting that appendix.

b. Other Changes to Regulation 1.35

The Commission has deleted paragraphs (f)–(l) of regulation 1.35, as proposed. To implement the CFMA, regulation 38.2 required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations that were no longer applicable post-CFMA.[75] The DCM Core Principles final rulemaking substantially revised part 38, but did not revoke regulation 38.2.[76] Instead, it updated the list of Commission regulations that are applicable to DCMs. Unlike its predecessor, regulation 38.2, as revised by the DCM Core Principles final rulemaking, only enumerates the Commission regulations from which DCMs are exempt.

As part of the ministerial amendments contained in this rulemaking, the Commission has eliminated from the Commission's regulations any provisions that have been inapplicable to DCMs since the passage of the CFMA, and that remain inapplicable after the passage of the DFA. Paragraphs (f)–(l) of regulation 1.35 are among those provisions. Pursuant to the deletion paragraph (j) of regulation 1.35, the Commission has copied most of that provision into new subsection (d)(7)(i) (formerly (b)(7)(i)). The Commission made these changes as proposed; it did not receive any comments on these provisions.

Also as part of the ministerial amendments contained in this rulemaking, the Commission proposed to eliminate regulations 1.35(a–1)(3)(ii) and 1.35(a–2)(3). However, regulation 38.2, as revised by the DCM Core Principles final rule, no longer exempts DCMs from these provisions. Accordingly, these provisions will not be eliminated in this rulemaking, and they are redesignated as regulations 1.35(b)(3)(ii) and 1.35(c)(3), respectively.

Regulation 1.35, as revised by this rulemaking, no longer agrees with regulation 38.2. As this rulemaking eliminates the provisions of regulation 1.35 that remain inapplicable to DCMs, the Commission is revising regulation 38.2 to remove references to those provisions of regulation 1.35 with which DCMs are not required to comply. The Commission considers this revision to regulation 38.2 technical in nature as it merely cleans up the discrepancy created by the revisions to regulation 1.35.

Finally, the Commission has made a technical correction to regulation 1.35(b)(3)(v) (redesignated herein as (d)(3)(v)) so that the final sentence references ''commodity futures, retail forex, commodity option, or swap books and records'' instead of ''commodity retail forex or commodity option books and records.'' The Commission has made this change as proposed; it did not receive any comments on this provision.

6. Regulation 1.37: Customer's or Option Customer's Name, Address, and Occupation Recorded; Record of Guarantor or Controller of Account

Dodd-Frank Act section 723(a)(3) added a new section 2(h)(8) to the CEA to require, among other things, that swaps subject to the clearing requirement of CEA section 2(h)(1) be executed either on a DCM or on a SEF. The DFA established SEFs as a new category of regulated markets for the purpose of trading and executing swaps. Because SEFs are now regulated markets under the CEA, many of the Commission's existing regulatory provisions that currently are applicable to DCMs also will become applicable to SEFs.

Accordingly, the Commission, as proposed, has amended paragraphs (c) and (d) of regulation 1.37, pertaining to recording foreign traders' and guarantors' names, addresses, and business information. Currently, these provisions apply to DCMs and futures and options contracts executed on those facilities. This revision amends the provisions to also include SEFs and swap transactions. Additionally, the Commission is amending the title and remaining text of regulation 1.37 to reflect the removal of the term ''option customer.'' [77] The Commission received no comments on these provisions.

7. Regulation 1.39: Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals

Like regulation 1.37, the Commission is amending regulation 1.39 to apply it to SEFs and swaps. Regulation 1.39, which has applied to members of contract markets, governs the simultaneous execution of buy and sell orders of different principals for the same commodity for future delivery by a member and permits the execution of such orders between such principals on a contract market. The Commission is amending this provision to include members of SEFs, and to include swap transactions. The Commission is also amending paragraph (c) to eliminate the reference to ''cross trades,'' as they are

[74] Customer Clearing Documentation, Time of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278, 21306 (Apr. 9, 2012).

[75] *See* 71 FR 1964 (Jan. 12, 2006).

[76] Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612 (June 19, 2012).

[77] *See supra,* section II.A.b. for a discussion of the deletion of the defined term ''option customer'' (1.3(jj)).

no longer defined under section 4c(a) of the Act, as amended by the DFA. The Commission received no comments and is making these revisions as proposed, with a slight modification to further clarify that the rule applies to SEFs in the same manner that it applies to DCMs.

8. Regulation 1.40: Crop, Market Information Letters, Reports; Copies Required

Regulation 1.40 requires FCMs, RFEDs, IBs and members of contract markets to furnish to the Commission certain information they publish or circulate concerning crop or market information affecting prices of commodities. The Commission is amending regulation 1.40 to apply it to trading on a SEF, to the extent that persons have trading privileges on the SEF. Persons without trading privileges on a SEF will not be subject to regulation 1.40. The amendments also update the forms of communication covered by the regulation by replacing the word ''telegram'' with ''telecommunication.'' The Commission is making these revisions as proposed; the Commission received no comments on these provisions.

9. Regulation 1.59: Activities of Self-Regulatory Employees, Governing Board Members, Committee Members and Consultants

The Commission proposed to amend regulation 1.59 to include SEFs and swaps. The Commission also proposed to amend regulation 1.59(b) to correct certain cross-references to the Act and Commission regulations. Regulation 1.59(c) has been revised to apply only to registered futures associations, as the prohibitions contained therein applicable to the other SROs already are addressed in proposed regulation 40.9.[78] The Commission is making these revisions as proposed; the Commission received no comments.

10. Regulation 1.63: Service on Self-Regulatory Organization Governing Boards or Committees by Persons With Disciplinary Histories

The Commission proposed to amend regulation 1.63 to correct certain cross-references to the Act and its regulations. The Commission also proposed to amend paragraph (d) to incorporate the posting of notices required under that paragraph on each SRO's Web site. The Commission received no comments regarding the proposed amendments to regulation 1.63 and is adopting the amendments without modification.

11. Regulation 1.67: Notification of Final Disciplinary Action Involving Financial Harm to a Customer

Regulation 1.67 requires contract markets, upon taking any final disciplinary action involving a member causing financial harm to a non-member, to provide notice to the FCM that cleared the transaction. FCMs and other registrants on SEFs should also be notified of any disciplinary action involving transactions on a SEF they executed for ECPs. Accordingly, the Commission proposed to amend regulation 1.67 to include SEFs, registrants and ECPs on such facilities. The Commission received no comments regarding proposed regulation 1.67 and is adopting the rule without modification.

12. Regulation 1.68: Customer Election Not To Have Funds, Carried by a Futures Commission Merchant for Trading on a Registered Derivatives Transaction Execution Facility, Separately Accounted for and Segregated

The Commission is hereby removing and reserving regulation 1.68. Regulation 1.68 had permitted a customer of an FCM to allow the FCM to not separately account for and segregate such customer's funds if, among other things, such funds are being carried by the FCM to trade on or through the facilities of a DTEF. No DTEF has ever registered with the Commission. Furthermore, section 734 of the Dodd-Frank Act repealed the DTEF provisions in the CEA, effective July 15, 2011. Therefore, because the statutory provisions underpinning regulation 1.68 have been repealed, the Commission is removing it from the Commission's regulations.[79]

13. Regulations 1.44, 1.53, and 1.62—Deletion of Regulations Inapplicable to Designated Contract Markets

The CFMA adopted core principles for DCMs.[80] On August 10, 2001, the Commission published final rules implementing provisions of the CFMA, in which it concluded that the CFMA's framework effectively constituted a broad exemption from many of the existing regulations applicable to DCMs.[81] Accordingly, the final rules included regulation 38.2, which required DCMs to comply with an enumerated list of Commission regulations, and exempted them from all remaining Commission regulations no longer applicable post-CFMA. As part of the ministerial amendments contained in the Proposal, the Commission proposed to eliminate from the Commission's regulations any provisions that have been inapplicable to DCMs since the CFMA was enacted and that remain inapplicable after enactment of the DFA. Accordingly, the Commission proposed to eliminate the following regulations: regulation 1.44 (Records and reports of warehouses, depositories, and other similar entities; visitation of premises), regulation 1.53 (Enforcement of contract market bylaws, rules, regulations, and resolutions), and regulation 1.62 (Contract market requirement for floor broker and floor trader registration). The Commission received no comments regarding the proposed deletion of these provisions and is hereby deleting such provisions as proposed.

14. Technical Changes to Part 1 and Part 22 in Order To Accommodate Recently Finalized Part 22

On February 7, 2012, the Commission finalized regulations in part 22 regarding the Protection of Cleared Swaps Customer Contracts and Collateral (''Cleared Swaps Customer Final Rule'').[82] The Cleared Swaps Customer Final Rule took effect on April 9, 2012, although the compliance date for the rule is November 8, 2012. The Cleared Swaps Customer Final Rule established a segregation regime applicable to FCMs and DCOs for ''Cleared Swaps Customer Collateral,'' as regulation 22.1 defines that term.[83] The rulemaking process involved extensive public comment, including through both an advanced notice of proposed rulemaking and a notice of proposed rulemaking.

The Cleared Swaps Customer Final Rule carefully established the basic architecture for protecting Cleared Swaps Customer Collateral. Both the Cleared Swaps Customer Final Rule and

[78] Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010).

[79] The Commission is also hereby deleting all other references to DTEFs, except those already removed by other Commission rulemakings, throughout its regulations. *See infra* Part II.G.

[80] Public Law 106–554, 114 Stat. 2763 (2000).

[81] A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR 42256 (Aug. 10, 2001).

[82] Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 FR 6336 (Feb. 7, 2012) (''Cleared Swaps Customer Final Rule'').

[83] Part 22 capitalizes definitions, but part 1 does not. Hence, in this rulemaking, terms defined in regulation 22.1 are capitalized, and terms defined in regulation 1.3 are not.

the related proposed rule [84] described how and to what extent the part 22 regulations for cleared swaps parallel and deviate from the part 1 regulations applicable to FCMs and DCOs relating to Customers' Money, Securities, and Property for exchange-traded contracts (referred to herein as the ''Part 1 Segregation Regulations''). In today's final rulemaking, the Commission is making technical corrections to certain of the Part 1 Segregation Regulations to make unambiguous that certain parallel Part 1 Segregation Regulations do not apply to Cleared Swaps Customer Collateral. These Part 1 Segregation Regulations only apply to the segregation of customer funds used to margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market, and all money accruing to such customers as a result of such contracts (referred to herein as ''futures contracts''), as well as to customer funds used to margin commodity option transactions on or subject to the rules of a contract market or DCO (referred to herein as ''options on futures contracts'').[85]

For the reasons stated above, the Commission is hereby making the following technical corrections:

In regulation 1.3, the Commission has added a definition of ''futures customer funds'' to reference only those funds used to margin futures contracts or commodity option transactions on or subject to the rules of a contract market, or DCO, as the case may be. This definition matches the existing definition of customer funds (regulation 1.3(gg)). The Commission is also adding a definition of ''Cleared Swaps Customer Collateral,'' which cross-references regulation 22.1's definition of this term. Regulation 1.3(gg)(''customer funds'') applies to both ''futures customer funds'' and ''Cleared Swaps Customer Collateral.'' The Proposal's definition in regulation 1.3(gg) had already applied to customer funds used to margin both futures and swaps.

Relatedly, the Commission is adding a definition of ''futures customer'' to regulation 1.3 and a definition of ''Cleared Swaps Customer,'' which cross-references regulation 22.1's definition of that term. As discussed above in section II.A.1.b. of this preamble, the definition of ''customer'' in regulation 1.3(k) will be finalized as proposed, to reference ''any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest.'' [86] The definition of ''customer'' refers to both a ''futures customer'' and a ''Cleared Swaps Customer'' because, as described in section II.A.1.f. of this preamble, this rulemaking is adopting a revised definition of ''commodity interest'' (regulation 1.3(yy)), largely as proposed, to reference futures, swaps, and contracts subject to Commission sections 2(c)(2), 4c or 19 of the Act.

The Proposal included an amendment to the definition of ''futures account'' in regulation 1.3(vv) to reference a related futures segregation provision of section 4 of the Act, as amended by the Dodd-Frank Act, *i.e.,* section 4d(a). The Proposal neglected to reference subsection (b) of section 4d, so today's final definition of ''futures account'' references sections 4d(a) and 4d(b) of the Act. The Commission did not receive comments about its proposed revisions to this definition. As a technical correction, the Commission is adding a definition of ''Cleared Swaps Customer Account,'' which references regulation 22.1's definition of that term. Relatedly, the Commission is adding a definition of ''customer account'' in regulation 1.3 to connote both a ''futures account'' and a ''Cleared Swaps Customer Account,'' as regulation 1.3 defines each of those terms.

The Commission is making a technical correction to paragraph (c)(5)(xiii)(C) of regulation 1.17 (''Minimum financial requirements for futures commission merchants and introducing brokers'') to restrict a provision pertaining to a foreign broker granted relief pursuant to regulation 30.10 to ''the foreign futures or foreign options secured amount, as § 1.3(rr) of this part defines such term.'' This provision has always referenced the foreign futures or foreign options secured amount. Thus, because ''customer funds'' includes both ''futures customer funds'' and ''Cleared Swaps Customer Collateral,'' the Commission is making a technical correction to replace the term ''customer funds'' in paragraph (c)(5)(xiii)(C) of regulation 1.17 with the term ''foreign futures or foreign options secured amount.''

The Commission is making technical corrections to regulation 1.20 (''Customer funds to be segregated and separately accounted for'') by: changing the title to ''Futures customer funds to be segregated and separately account for''; replacing references to ''customer funds'' and ''customers'' to ''futures customer funds'' and ''futures customers''; and linking the regulation to those provisions of section 4d of the Act, as amended by the Dodd-Frank Act, pertaining to the segregation of futures customer funds (*i.e.,* sections 4d(a) and (b)).

The Commission is making technical corrections to regulation 1.21 (''Care of money and equities accruing to customers'') by changing the title to ''Care of money and equities accruing to futures customer'' and replacing references to ''customer'' with references to ''futures customer.'' The Cleared Swaps Customer Final Rule did not create a parallel regulation in part 22 on the grounds that such parallels were not necessary because: (1) Regulation 22.1 broadly includes ''accruals'' in the definition of Cleared Swaps Customer Collateral, and (2) regulation 22.2(e) permits an FCM to commingle the Cleared Swaps Customer Collateral of multiple Cleared Swaps Customers. Thus, although revised regulation 1.21 is limited to futures customers and there is no parallel regulation in part 22, part 22 captures the substance of regulation 1.21 with respect to Cleared Swaps Customers and Cleared Swaps Customer Collateral.

The Commission is making technical corrections to regulation 1.22 (''Use of customer funds restricted'') by changing the title to ''Use of futures customer funds restricted'' and replacing references to ''customer funds'' and ''customer'' with references to ''futures customer funds'' and ''futures customer.'' The Cleared Swaps Customer Final Rule incorporated these requirements into part 22 with respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers.

The Commission is making technical corrections to regulation 1.23 (''Interest of futures commission merchant in funds; additions and withdrawals'') by changing the title to ''Interest of futures commission merchant in segregated futures customer funds; additions and withdrawals;'' replacing references to ''customer funds'' and ''customer'' with references to ''futures customer funds'' and ''futures customer;'' and linking the regulation to sections 4d(a) and (b) of the Act.[87]

[84] Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 FR 33818 (June 9, 2011).

[85] See generally Cleared Swaps Customer Final Rule, 77 FR at 6363 (''Sections 22.2 through 22.10 implement the basic architecture of a system of segregation for swaps customer funds roughly comparable to the system used for customer funds for futures contracts under CEA sections 4d(a)(2) and 4d(b) and Commission regulations 1.20 through 1.30 and 1.49.'').

[86] As finalized, the definition of customer in regulation 1.3(k) preserves existing treatment of proprietary accounts.

[87] The Cleared Swaps Customer Final Rule created analogous requirements in part 22 with

The Commission is making technical corrections to regulation 1.24 (''Segregated funds; exclusions therefrom'') by replacing a reference to ''customers'' with ''futures customers.'' [88]

The Commission is making technical corrections to regulation 1.26 (''Deposit of instruments purchased with customer funds'') by: changing the title to ''Deposit of instruments purchased with futures customer funds''; replacing references to ''customer funds'' and ''customer'' with references to ''futures customer funds'' and ''futures customer;'' and linking the regulation to sections 4d(a) and (b) of the Act.[89]

The Commission is making technical corrections to regulation 1.32 (''Segregated account; daily computation and record'') by replacing references to ''customer funds,'' ''customer,'' and ''customer account'' with references to ''futures customer funds,'' ''futures customer,'' and ''futures customer account.'' [90]

The Commission is making a technical correction to regulations 1.21, 1.23, 1.24, 1.26, 1.29, 140.735–2a, and 140.735–3 by replacing the term ''clearing organization'' or ''clearinghouse'' with ''derivatives clearing organization.'' Since Congress' enactment of the CFMA in 2000,[91] which added ''derivatives clearing organization'' as a new defined term to section 1a of the Act, the intent of these regulations has been to refer to ''derivatives clearing organizations.''

The Commission is making technical changes to subsection (1)(iii) of regulation 1.33 (''Monthly and Confirmation statements'') to specifically reference ''futures customer funds'' and the ''foreign futures and foreign options secured amount.'' This subsection presently refers to these classes of customer funds; the intention of this technical amendment is to clarify that meaning.

Proposed amended regulation 1.33(a)(3) described what ''swap positions'' information an FCM must provide in monthly statements to its customers. The Commission did not receive comments on this proposal and is publishing it as proposed, except for the following. In line with the aforementioned technical corrections, today's final version of regulation 1.33 replaces ''swap position'' with ''Cleared Swaps Customer.'' Today's final rulemaking also makes a technical correction to regulation 1.33 by combining subsections (a)(1)(iv), (a)(2)(v), and proposed (a)(3)(iv) into a new paragraph (a)(4).

Unlike the aforementioned Part 1 Segregation Regulations, Regulation 1.25 (''Investment of customer funds''), on the other hand, now properly applies to both futures customer funds and Cleared Swaps Customer Collateral. Thus, its title will continue to refer to ''customer funds,'' which, as defined by revised regulation 1.3(gg), includes both futures customer funds and Cleared Swaps Customer Collateral. However, the Commission is making technical corrections to regulation 1.25 as part of today's final rulemaking by adding references to regulation 22.5 (''Futures commission merchants and derivatives clearing organizations: Written acknowledgment'') alongside current references to regulation 1.26 (''Deposit of instruments purchased with customer funds'') (to be amended herein as ''Deposit of instruments purchased with futures customer funds''). The Commission explains this reference to regulation 22.5 in a new provision at the end of paragraph (d)(13) of regulation 1.25.

The foregoing technical corrections to the Part 1 Segregation Regulations are designed to ensure that, when taken together with the Cleared Swaps Customer Final Rule, they do not create redundant, and potentially conflicting, duties for FCMs and DCOs. For similar reasons, the Commission is making certain equivalent technical corrections to part 22. As mentioned above, none of these technical changes alter the meaning of any regulation of part 22. First, the Commission is deleting the definition of ''Customer'' from regulation 22.1 (''Definitions''). Because of the aforementioned addition of the definition of ''futures customer'' in regulation 1.3, regulation 22.1's definition of ''Customer'' is no longer needed or correct. Consequently, in regulation 22.2 (''Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral''), the Commission is replacing references to ''Customers'' with references to ''futures customers'' or ''foreign futures or foreign options customers,'' as regulation 30.1(c) defines that term. For the same reason, in regulation 22.3(b)(2)(iii) (''Derivatives clearing organizations: Treatment of Cleared Swaps Customer Collateral''); paragraphs (a) and (b) of regulation 22.5 (''Futures commission merchants and derivatives clearing organizations: Written acknowledgement''); and paragraph (a) of regulation 22.9 (''Denomination of Cleared Swaps Customer Collateral and location of depositories''), the Commission is replacing references to funds belonging to ''Customers'' with references to ''futures customer funds.''

In addition, since, as described above, regulation 1.25 (''Investment of customer funds'') applies to both futures customer funds and Cleared Swaps Customer Collateral, the Commission is making a technical correction to paragraph (e)(1) of regulation 22.2 and paragraph (d) of regulation 22.3 by omitting, ''which section shall apply to such money, securities, or other property as if they comprised customer funds or customer money subject to segregation pursuant to section 4d(a) of the Act and the regulations thereunder.''

Similarly, the Commission is making a technical correction to regulation 22.9 (''Denomination of Cleared Swaps Customer Collateral and location of depositories'') by omitting a reference to Cleared Swaps Customer Collateral. Regulation 22.9 cross-references regulation 1.49 (''Denomination of customer funds and location of depositories''). Because the new revised definition of ''customer funds'' in regulation 1.3 references both futures customer funds and Cleared Swaps Customer Collateral, regulation 1.49 references to both classes of funds. Therefore, regulation 22.9 can reference regulation 1.49 without making a specific reference to Cleared Swaps Customer Collateral, which the Commission has always intended.

Moreover, as a result of the corrections to the definition described above, the Commission is making (1) a technical correction to regulation 22.10 (''Application of other regulatory provisions'') to avoid confusion as to the applicability of regulations 1.27, 1.28, 1.29, and 1.30 to Cleared Swaps, Cleared Swaps Customers, and Cleared Swaps Customer Collateral, and (2) technical corrections to regulations 22.13(a)(2) and 22.15 to incorporate the new ''Futures Customer'' and ''Foreign Futures or Foreign Options Customer'' terms.

The Commission is also making technical corrections to regulation 22.11, regulation 22.13(a)(1), the title of regulation 22.14, regulation 22.14(a)(2), regulation 22.14(c)(2), regulation 22.15, and the title of regulation of 22.16 by replacing references to ''Customer'' with

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respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers. See 17 CFR 22.2(e)(3).

[88] The Cleared Swaps Customer Final Rule created analogous provisions in part 22 with respect to Cleared Swaps Customers. See 17 CFR 22.2(d)(3).

[89] The Cleared Swaps Customer Final Rule created analogous requirements in regulation 22.5 17 CFR 22.5.

[90] The Cleared Swaps Customer Final Rule mirrored some of regulation 1.32's requirements in part 22 with respect to Cleared Swaps Customer Collateral and Cleared Swaps Customers. See 17 CFR 22.2(g).

[91] Public Law 106–55, 114 Stat. 2763 (Effective December 21, 2000).

the correct term ''Cleared Swaps Customer.'' Since its publication, regulation 22.11 has always intended to reference only Cleared Swaps Customers.

In addition, the Commission is making technical corrections to regulation 22.12 (''Information to be maintained regarding Cleared Swaps Customer Collateral'') by replacing the term ''Cleared Swaps Customer Funds,'' with the correct term, ''Cleared Swaps Customer Collateral.''

The Commission notes that its regulations refer to ''customer funds'' in the following regulations: 3.10, 3.21, 5.5, 39.15, 39.16, and 170.5, as well as in Appendices to part 190. ''Customer funds'' also appears in the following regulations recently amended by the Commission's final rulemaking concerning Core Principles and Other Requirements for Designated Contract Markets: [92] 1.52, 38.603, 38.604, and Appendix B to part 38. The Commission believes that these provisions properly refer to ''customer funds'' as revised regulation 1.3(gg) now defines that term, *i.e.,* to connote both ''futures customer funds'' and ''Cleared Swaps Customer Collateral.''

B. Part 7

The Commission proposed to rename part 7 of the Commission's regulations ''Registered Entity Rules Altered or Supplemented by the Commission,'' thus reflecting the language in section 8a(7) of the Act, as amended by the Dodd-Frank Act, which provides the basis for part 7. The Commission also proposed to make a similar change in regulation 7.1, replacing contract market rules with registered entity rules. Finally, the Commission proposed to remove and reserve subparts B (Chicago Mercantile Exchange Rules) and C (Board of Trade of the City of Chicago Rules) and their associated sections. The Commission received no comments regarding the proposed amendments to part 7 and is adopting these amendments as proposed.

C. Part 8

The Commission proposed to remove part 8 of its regulations. Regulation 38.2 enumerates the provisions with which DCMs are not required to comply. The part 8 regulations are among those provisions.[93] In the DCM Core Principles final rules, the Commission adopted regulations in ''Subpart N—Disciplinary Procedures'' of part 38 to amend the disciplinary procedure requirements applicable to DCMs.[94] Several of the regulations adopted in subpart N of part 38 are similar to the text of the disciplinary procedures found in part 8 of the Commission's regulations.[95] The Commission proposed to remove part 8 from its regulations to avoid any confusion that could result from those regulations containing two sets of exchange disciplinary procedures. The Commission received no comments regarding the proposed deletion of part 8 and is therefore deleting those regulations as proposed.

D. Parts 15, 18, 21, and 36

The Commission also proposed to incorporate changes into parts 15, 18, 21, and 36 of its regulations to account for (1) the DFA's elimination of two categories of exempt markets, exempt commercial markets (''ECMs'') and electronic boards of trade (''EBOTs''); and (2) the DFA's grandfather relief provisions for such entities.

Section 723 of the DFA repealed CEA section 2(h), thus eliminating the ECM category. Section 734 of the DFA repealed CEA section 5d, thus eliminating the EBOT category. Section 734 also repealed CEA section 5a, thus eliminating the DTEF category of regulated markets effective July 15, 2011, as discussed above.

Both sections 723 and 734 of the Dodd-Frank Act contain grandfather provisions allowing ECMs and EBOTs to petition the Commission to continue to operate as ECMs and EBOTs. Pursuant to the grandfather provisions, in September 2010, the Commission issued orders regarding the treatment of such grandfather petitions (the ''Grandfather Relief Orders'').[96] Under the Grandfather Relief Orders, the Commission may, subject to certain conditions, provide relief to ECMs and EBOTs for up to one year from the general effective date of the DFA's amendments to the CEA. On July 13, 2012, the Commission amended for the second time a Commission order dated July 14, 2011, by, among other things, allowing ECMs and EBOTs, as well as markets that rely on pre-DFA CEA section 2(d)(2), to rely only on the amended order (''Second Amended July 14 Order'') after July 16, 2012.[97]

Pursuant to the DFA and the Grandfather Relief Orders, the Commission proposed to remove from parts 15, 18, 21 and 36 [98] references to CEA sections 2(h) and 5d and to replace those references, where appropriate, with references to the Grandfather Relief Orders as the authority under which ECMs and EBOTs can continue to operate. The Commission also proposed to remove from parts 15, 18, 21, and 36 of its regulations references to CEA sections 2(d), 2(g), and 5a, as well as references to DTEFs. The Commission received no comments regarding the amendments to parts 15, 18, 21, and 36. The Commission is revising regulation 36.1 in order to account for the expiration of the Grandfather Relief Orders on July 16, 2012, as well as reliance by ECMs and EBOTs on the Second Amended July 14 Order. Otherwise, the Commission is adopting the amendments to parts 15, 18, 21, and 36 as proposed.

E. Parts 41, 140, and 145

The Commission also proposed to incorporate changes into its regulations to account for other new categories of registered entities and to include new products now subject to Commission jurisdiction. Section 733 of the Dodd-Frank Act added new section 5h to the CEA and created SEFs. Section 728 of the Dodd-Frank Act added new section 21 to the CEA and created SDRs. SEFs will allow for the trading of swap transactions between ECPs, as that term is defined in CEA section 1a(18).[99] In addition to the amendments contained in proposed part 37, the Commission proposed additional amendments throughout the regulations to include SEFs and SDRs where necessary. The Commission also proposed to delete from part 41 references to DTEFs as that term was deleted from CEA section 5b by the Dodd-Frank Act, effective July 15, 2011.[100] The Commission received

[92] 77 FR 3661 (June 19, 2012) (Effective date: August 20, 2012).

[93] 17 CFR 38.2.

[94] 77 FR at 36649. The DCM Core Principles final rules take effect on August 20, 2012. Section 735 of the Dodd-Frank Act eliminates all DCM designation criteria, including Designation Criterion 6 (Disciplinary Procedures). Section 735 of the Dodd-Frank Act creates a new Core Principle 13 (Disciplinary Procedures) that is devoted exclusively to exchange disciplinary proceedings, and captures disciplinary concepts inherent in both Designation Criterion 6 and in current DCM Core Principle 2.

[95] Paragraph (b)(4) of the acceptable practices for former Core Principle 2 referenced part 8 of the Commission's regulations as an example that DCMs could follow to comply with Core Principle 2. 17 CFR pt. 38, app. B, Acceptable Practices for Core Principle 2 at (b)(4). In its experience, the Commission has found that many DCMs' disciplinary programs do in fact model their disciplinary structures and processes on part 8.

[96] 75 FR 56513 (Sept. 16, 2010).

[97] 77 FR 41260 (July 13, 2012).

[98] Part 36 provisions apply to ECMs and EBOTs. The Commission is not deleting part 36 in its entirety because part 36 provisions will continue to apply to ECMs and EBOTs that continue to operate under the Grandfather Relief Orders.

[99] For a detailed discussion of the proposed rules as they directly relate to SEFs, *see* 76 FR 1214 (Jan. 7, 2011).

[100] Section 5b of the CEA provided for the registration of DTEFs. Although secondary references to DTEFs remain in the CEA, none of the

no comments to its deletion of the term DTEF from part 41 and is adopting this change as proposed. In addition, as part of today's final rulemaking, the Commission is making a technical change to part 41 so that references to the definition of ''narrow-based security index'' is cited as section 1a(35) of the Act instead of section 1a(25) of the Act.

The proposed changes throughout parts 140 (Organization, Functions and Procedures of the Commission) and 145 (Commission Records and Information) reflect the need to incorporate SEFs and SDRs into the Commission's regulations dealing with the rights and obligations of other registered entities. The Commission proposed amending regulation 140.72 to provide the Commission with the authority to disclose confidential information to SEFs and SDRs. This provision allows the Commission, or specifically identified Commission personnel, to disclose information necessary to effectuate the purposes of the CEA, including such matters as transactions or market operations. The Commission proposed amending regulation 140.96 to authorize the Commission to publish in the **Federal Register** information pertaining to the applications for registration of DCMs, SEFs and SDRs, as well as new rules and rule amendments which present novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, or regulations under the Act. The Proposal included an amendment to regulation 140.99 to include SEFs and SDRs to the categories of registered entities that may petition the Commission for exemptive relief and no-action and interpretative letters.

The Commission proposed amending regulation 140.735–2 by adding swap and retail forex transactions, as regulation 5.1(m) defines the latter term, to those agreements, contracts or transactions Commission staff may not trade. The Commission proposed amending regulation 140.735–3 to add SEFs and SDRs to the list of entities from which Commission members and employees may not accept employment or compensation.

The Commission received no comments about these proposed amendments to part 140 and is adopting them as proposed, except for two technical corrections to regulation 140.735–2. The Proposal added ''swap transaction'' to the text of paragraph (c) but inadvertently omitted updating a cross-reference to paragraph (b) that references ''swaps.'' Today's final rulemaking updates that cross-reference accordingly. Similarly, the Proposal added ''swap transaction'' to one sentence of paragraph (c)'s footnote three but, inadvertently, did not add ''swap transaction'' to another sentence of that paragraph. Thus, today's rulemaking makes a technical correction by adding ''swap transaction'' to that other sentence.

The Commission proposed amending regulation 145.9 to expand the definition of ''submitter'' by adding SEFs and SDRs to the list of registered entities to which a person's confidential information has been submitted, and which, in turn, submit that information to the Commission. This amendment allows individuals who have submitted information to a SEF or SDR to request confidential treatment under regulation 145.9. The Commission received no comments about this proposed amendment and is adopting it as proposed.

Appendix A to Part 145 discusses those portions of Commission records made available to the public. Section (b) discusses information made available in the public reading area of the Commission's Office of the Secretariat. The Proposal amended subsection (b)(13) by adding ''application form'' to the list of publicly available portions of applications for becoming a registered entity. One month following the publication of the Proposal, *i.e.* in July 2011, the Commission published final amendments to Regulation 40.8(a) (''Availability of public information'').[101] Regulation 40.8(a) is consistent with proposed (b)(13) of Appendix A except for the fact that Regulation 40.8(a) references a ''first page of the application cover sheet'' instead of an ''application form.'' Thus, as part of today's final rulemaking, the Commission is making a technical correction by deleting the proposed language, ''application form,'' and replacing it with ''first page of the application cover sheet'' so that it is consistent with regulation 40.8(a.)[102]

F. Parts 155 and 166

1. Regulation 155.2: Trading Standards for Floor Brokers

The Commission is removing the references to regulation 1.41 within regulation 155.2 because the Commission removed and reserved regulation 1.41 in 2001[103] pursuant to the CFMA. The Commission is also removing the related reference to former section 5a(a)(12)(A) of the Act. The Commission did not receive any comments on these changes in the Proposal and is finalizing them as proposed.

2. Regulation 155.3: Trading Standards for Futures Commission Merchants and Regulation 155.4: Trading Standards for Introducing Brokers

The Commission is removing references to ''option customer'' in these two regulations pursuant to this final rulemaking's deletion of that term from regulation 1.3, described above. The Commission did not receive comments about this change following publication of the Proposal and is amending regulations 155.3 and 155.4 as proposed.

3. Regulation 166.2: Authorization To Trade

The Commission is revising this regulation by incorporating the revised definition of ''commodity interest'' (regulation 1.3(yy)), discussed above. The Commission believes that paragraph (a) of regulation 166.2 should refer to futures, options, or swaps and that paragraph (b) should refer only to futures or options. The Commission did not receive comments about these changes and is adopting them as proposed.

4. Regulation 166.5: Dispute Settlement Procedures

The Commission is revising this regulation by deleting a reference to ''option customer'' because, as described above, today's rulemaking deletes that term from regulation 1.3. The Commission is also making a conforming, technical change to regulation 166.5, described in section G.2., below.

G. Other General Changes to CFTC Regulations

1. Removal of References to DTEFs

The Commission is removing references to DTEFs and regulations pertaining to DTEFs in parts 1, 5, 15, 36,

those would enable an entity to commence operations as a DTEF. The proposed deletions are in regulations 41.2, 41.12, 41.13, 41.21–41.25, 41.27, 41.43 and 41.49.

[101] Provisions Common to Registered Entities, 76 FR 44776, 44797 (July 27, 2011).

[102] In November 2011, the Commission published a final version of Regulation 39.3 (''Procedures for [DCO] registration''). To be consistent with Regulation 40.8(a), subsection (a)(5) of Regulation 39.3 (''Public information'') references the ''first page of the Form DCO cover sheet.'' *See* Derivatives Clearing Organization General Provisions and Core Principles Regarding Rulemaking, 76 FR 69334, 69431(Nov. 8, 2011). Form DCO is the application for registration to become a DCO. Thus, today's technical correction to subsection (b)(13) of Appendix A is consistent with both Regulation 40.8(a) and Regulation 39.3(a)(5).

[103] 66 FR 42256.

41, 140, and 155 because section 734 of the DFA abolished DTEFs, effective July 15, 2011.[104]

2. Other Conforming Changes

The Commission is also making changes to various parts of its regulations to update cross-references to CEA provisions, now renumbered after the passage of the DFA. An example of one such change is amended regulation 166.5, in which the Commission has updated the reference to the statutory definition of the term ''eligible contract participant,'' to reflect the Dodd-Frank Act's renumbering of CEA section 1a. Additionally, where typographical errors or other minor inconsistencies were discovered while reviewing CFTC regulations, this rulemaking includes instructions and amended regulations to correct them.

III. Administrative Compliance

A. Paperwork Reduction Act

Sections 1.31, 1.33, 1.35, 1.37, and 1.39 of the Commission's regulations are being amended to provide that records of swap transactions be kept in a similar manner to records of futures transactions. These amended provisions impose new information recordkeeping requirements that constitute the collection of information within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[105] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (''OMB'') and displays a currently valid control number.[106] This rulemaking contains new collections of information for which the Commission must seek a valid control number. The Commission therefore has requested that OMB assign a control number for this collection of information. The Commission has also submitted the proposed rulemaking, this final rule release, and supporting documentation to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for these new collections of information is ''Adaptation of Regulations to Incorporate Swaps,'' OMB Control Number 3038–0090. Responses to these information collections will be mandatory.

With respect to all of the Commission's collections, the Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information To Be Provided by Reporting Entities/Persons

a. Amendments to Regulation 1.31 (Books and Records; Keeping and Inspection)

Regulation 1.31 describes the manner in which ''all books and records required to be kept by the Act'' must be maintained. Most of the requirements of regulation 1.31 are applicable to FCMs, IBs, RFEDs, CTAs, CPOs, and members of DCMs and SEFs in conjunction with other part 1 regulations, and the PRA burdens either have been or will be covered by the OMB control numbers associated with the other part 1 regulations. Examples of these other part 1 regulations are regulation 1.33, which requires certain registrants to produce monthly confirmation statements, and regulation 1.35, which requires the maintenance of records of cash commodity, futures, and option transactions (as finalized, Records of commodity interest and cash commodity transactions). Regulation 1.31 is applicable to SDs and MSPs by way of the part 23 regulations.[107]

i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

Regulation 1.31 additionally contains discrete stand-alone collections for which a control number must be sought. Subsection (b)(3)(ii) requires persons keeping records using electronic storage media to ''develop and maintain written operational procedures and controls (an 'audit system') designed to provide accountability over [the entry of records into the electronic storage media].'' This provision is already applicable to FCMs, RFEDs, IBs, CTAs, CPOs, and members of DCMs, and would be applicable to SDs and MSPs pursuant to the part 23 regulations. As members of SEFs will be newly subject to the part 1 regulations, the Commission must estimate the burden of subsection (b)(3)(ii) on these entities and seek OMB approval for this new application of the subsection.

The Commission anticipates that members of SEFs may incur certain one-time start-up costs in connection with establishing the audit system. This will include drafting and adopting procedures and controls and may include updates to existing recordkeeping systems. The Commission estimates the burden hours associated with these one-time start-up costs to be 100 hours per SEF member.

As there are not any SEFs operating at the present, in light of the fact that the Commission has not yet finalized regulations concerning SEF Core Principles, it is not possible for the Commission to estimate with precision how many SEF members there will be or how many of those SEF members will be FCMs, SDs, or MSPs that are being covered by already pending existing information collections. Nonetheless, the Commission has estimated that 35 SEFs will register with it after the Dodd-Frank Act becomes effective, and now is estimating that there may be on average 100 members of a SEF that will not fall under one of the other collections. Accordingly, the aggregate new burden of subsection (b)(3)(ii) is estimated to be 100 one-time burden hours to approximately 3,500 SEF members.

The Commission expects that compliance and operations managers will be employed in the establishment of the written procedures and controls under subsection (b)(3)(ii). According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, ''Financial Managers,'' that is employed by the ''Securities and Commodity Contracts Intermediation and Brokerage'' industry is $80.90.[108] Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of $100 per hour. Accordingly, the burden associated with developing written procedures and controls will total approximately $10,000 for each applicable member of a SEF on a one-time basis.

ii. Representation to the Commission Prior to Initial Use of System

Members of SEFs will also have to comply with regulation 1.31(c), which requires persons employing an

[104] This rulemaking is not deleting those DTEF references that other rulemakings have deleted or will delete from the Commission's regulations (*e.g.,* some references in part 3 and all references in part 40).

[105] 44 U.S.C. 3501 *et seq.*

[106] Id.

[107] Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 FR 20128 (Apr. 3, 2012).

[108] Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, *http://www.bls.gov/oes/current/oes113031.htm* (May 2011).

electronic storage system to provide a representation to the Commission prior to the initial use of the system.[109] The Commission estimates the burden of drafting this representation in accordance with regulation 1.31(c) and submitting it to the Commission to be one hour.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, ''Financial Managers,'' (which includes operations managers) that is employed by the ''Securities and Commodity Contracts Intermediation and Brokerage'' industry is $80.90.[110] Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of $100 per hour. Accordingly, the burden associated with drafting and submitting the representation prior to using an electronic storage system will be $100 ($100 x 1 hour) per affected member of a SEF.

iii. Comments Received

The Commission did not receive any comments concerning the cost for SEF members to comply with the recordkeeping requirements contained in regulation 1.31.

b. Amendments to Regulation 1.33 (Monthly and Confirmation Statements)

The Commission is amending regulation 1.33 by requiring FCMs to include in their monthly and confirmation statements sent to customers certain specified information related to a customer's Cleared Swap positions. The information required to be summarized in respect of swap transactions will be analogous to information currently required to be kept in respect of futures and commodity option transactions. The Commission estimates the burden of complying with regulation 1.33 in respect of swap transactions to be 1 hour for each Cleared Swap confirmation and 1 hour for each monthly statement.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, ''Financial Managers,'' (which includes operations managers) that is employed by the ''Securities and Commodity Contracts Intermediation and Brokerage'' industry is $80.90.[111] Accordingly the burden associated with complying with regulation 1.33 in respect of each Cleared Swap confirmation will be $80.90 ($80.90 × 1 hour), and the burden will be $80.90 ($80.90 × 1 hour) for each monthly statement regarding Cleared Swaps.

i. Comments Received

The Commission did not receive any comments concerning the cost for FCMs to comply with the recordkeeping requirements contained in regulation 1.33 with respect to their swap transactions.

c. Amendments to Regulation 1.35 (Records of Commodity Interest and Cash Commodity Transactions)

i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The amendments will require members of SEFs to comply with the regulation 1.35 recordkeeping requirements that are currently followed by FCMs, IBs, RFEDs, and members of DCMs. The Commission anticipates that members of SEFs will spend approximately eight hours per trading day (or 2,016 hours per year based on 252 trading days) compiling and maintaining transaction records.

According to recent Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 11–3031, ''Financial Managers,'' (which includes operations managers) that is employed by the ''Securities and Commodity Contracts Intermediation and Brokerage'' industry is $80.90.[112] Because members of SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly wage of $100 per hour. Thus, each SEF member will have a burden of $201,600 per year (2,016 hours × $100/hour).

The amendments to regulation 1.35 will also require FCMs, RFEDs, IBs, and members of DCMs to comply with the regulation 1.35 recordkeeping requirements for any swap transactions into which they enter. Because the proposed recordkeeping requirements for swaps would be equivalent to the recordkeeping requirements they must currently follow in respect of futures and commodity option transactions, the additional burden for any swap transaction would be the same for any additional futures and commodity option transaction for which they keep records pursuant to regulation 1.35 in its current form. The Commission estimates that the recordkeeping burden associated with each swap transaction would be 0.5 hours, for a total burden of $50 per transaction.

ii. Comments Received

The Commission did not receive any comments concerning the excepted cost of complying with the aforementioned revisions to regulation 1.35.

d. Amendments to Regulation 1.37 (Customer's Name, Address, and Occupation Recorded; Record of Guarantor or Controller of Account)

i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The Commission is amending regulation 1.37(a) by requiring each FCM, IB, and member of a DCM to keep the same kind of record (showing the customer's name, address, occupation or business, and name of any other person guaranteeing the account or exercising any trading control over it) for any swap transactions it ''carries or introduces'' for another person. The Commission estimates that it will take each of these entities an average of 0.4 hours to gather the information and file it or key it into the entity's customer recordkeeping programs.

The Commission also is amending regulation 1.37(b) by requiring each FCM carrying an omnibus account for another FCM, a foreign broker, a member of a DCM or any other person to maintain a daily record for such account of the total open long contracts and the total open short contracts in each swap. FCMs presently have an equivalent obligation with respect to futures and commodity option transactions. These daily records typically are maintained in electronic form. Therefore, once a position is entered into the entity's systems, the daily record will be automatically available. The Commission estimates that entering the position into the system, commencing with the placement of an order and ending with execution will take each of these entities an average of 0.4 hours.

The Commission additionally is amending regulation 1.37(c) by requiring SEFs to comply with a provision that DCMs must currently follow: Keep a record showing the true name, address, and principal occupation or business of any foreign trader executing transactions on the

[109] As with subsection (b)(3)(ii), regulation 1.31(c) is already applicable or will be made applicable by other actions to FCMs, IBs, DCM members, as well as SDs or MSPs pursuant to the part 23 regulations.

[110] Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, *http://www.bls.gov/oes/current/oes113031.htm* (May 2011).

[111] Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, *http://www.bls.gov/oes/current/oes113031.htm* (May 2011).

[112] Occupational Employment Statistics, Occupation Employment and Wages: 11–3031 Financial Managers, *http://www.bls.gov/oes/current/oes113031.htm* (May 2011).

facility or exchange. According to regulation 1.37(d), this provision does not apply in respect of futures/options/swaps that foreign traders execute through FCMs or IBs.

The Commission estimates that it would take a SEF a total of 0.4 hours to prepare each record in accordance with regulation 1.37(c). According to the Bureau of Labor Statistics, the mean hourly wage of an employee under occupation code 43–9021, ''Data Entry Keyer,'' is $13.95.[113] Because SEFs may be large entities employing persons at wages higher than the average, the Commission conservatively estimates the mean hourly wage to be $19.03 per hour. Thus, the burden associated with preparing a record with regulation 1.37(c) would be $7.61 ($19.03/hour × 0.4 hours).

ii. Comments Received

The Commission did not receive any comments concerning the extension of regulation 1.37 to swap transactions executed by FCMs, IBs, and other DCM members.

e. Amendments to Regulation 1.39 (Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals)

i. Obligation To Develop and Maintain Recordkeeping Policies and Controls

The Commission is amending regulation 1.39, which currently applies to DCMs, by enabling members of SEFs to execute simultaneous buying and selling orders of different principals pursuant to rules of the SEF if certain conditions are met. Among those conditions, a SEF would have to record these transactions in a manner that ''shows all transaction details required to be captured by the Act, Commission rule, or regulation.'' The Commission anticipates that the data to be captured would already exist in the SEF's trading system. The Commission estimates that it will take the SEF an average of 0.1 hours to capture this data, and storage costs of less than $1 per record.

According to the recent Bureau of Labor Statistics, the mean hourly wage of computer programmers under occupation code 15–1131 and computer software developers under program codes 15–1132 are between $36.54 and $44.27.[114] Because SEFs may be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly programming wage of $50 per hour for each of the categories of persons who will have to establish the system for maintaining oral records. Accordingly, the start-up burden associated with the data capture requirements would be an average of $5.

ii. Comments Received

The Commission did not receive any comments concerning the extension of regulation 1.39 to transactions executed on a SEF.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[115] The rules adopted by the Commission are for the most part technical amendments to conform the affected parts to provisions of the Dodd-Frank Act and, as such, are non-substantive and will not have a significant economic impact on a substantial number of any types of entities, whether or not they are small entities. In order to conform the Commission's existing records regulations to its new recordkeeping requirements for SDs and MSPs (Regulation 23.202 (''Daily Trading Records'')),[116] the Commission also is amending its regulation 1.35 records requirements (as finalized, Records of commodity interest and cash commodity transactions) to require FCMs, IBs, RFEDs, and members of DCMs to observe recordkeeping requirements for swaps that they currently observe with respect to their futures and commodity option transactions.

Additionally, the Commission is applying certain of those books and records regulations to members of SEFs, mirroring obligations that apply to members of DCMs.

Accordingly, the Commission is hereby determining that most of the entities affected by this rulemaking will not be significantly economically impacted by the conforming and technical rules being adopted. As discussed below, the Commission is also determining that most of the entities that will be subject to compliance with this rulemaking are not small entities for the purposes of the RFA. Therefore, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies by category of market participant below that the final rules will not have a significant economic effect on a substantial number of small entities.

1. FCMs, RFEDs, DCMs, ECPs, SEFs and Large Traders

The Commission has previously determined that registered FCMs, RFEDs, DCMs, ECPs, SEFs and large traders are not small entities for purposes of the RFA.[117] The Commission has been informed, in the context of other rulemakings, that there are some entities that are both ECPs as defined in the CEA and also are small entities as defined by the Small Business Administration (''SBA''). In particular, the SBA has defined as small entities those entities that are engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding year did not exceed four million megawatt hours. As noted previously, however, this rulemaking involves primarily technical conforming amendments that alone do not impose significant economic impacts on any group of entities, and that overlap with substantive rulemakings in which the Commission has assessed or will assess the economic impact on small entities to the extent required under the RFA. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the final rules will not have a significant economic impact on a substantial number of small entities with respect to these entities.

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[113] Occupational Employment Statistics, National Industry-Specific Occupational Employment and Wage Estimates, NAICS 523100—Securities and Commodity Contracts Intermediation and Brokerage, *http://www.bls.gov/oes/current/oes439021.htm* (May 2011).

[114] Occupational Employment Statistics, Occupational Employment and Wages: 15–1131, Computer Programmers, *http://www.bls.gov/oes/current/oes151131.htm* (May 2011); Occupational Employment Statistics, Occupational Employment and Wages: 15–1132, Computer Software Developers, *http://www.bls.gov/oes/current/oes151132.htm* (May 2011).

[115] 5 U.S.C. 601 *et seq.*

[116] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012) (adopting for SDs and MSPs reporting and recordkeeping standards now found in 17 CFR 23.201–23.203).

[117] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, FCMs, and large traders) (''RFA Small Entities Definitions''); Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25, 2001 (ECPs); Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55410, 55416, Sept. 19, 2010 (RFEDs) (''Retail Forex Final Rules''); and Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (SEFs).

2. IBs

As discussed above, most of the provisions of this rulemaking are technical and conforming in nature, and overlap with substantive rulemakings in which the Commission has conducted RFA analyses to the extent such are required.

The Commission provided an initial regulatory flexibility analysis for IBs in the its proposing release, as required by 5 U.S.C. 603, because the oral recordkeeping requirement under regulation 1.35(a), as proposed, may have had a significant economic impact on a significant number of small IBs.[118] As discussed above, the Commission has decided not to adopt the proposed oral communications recordkeeping requirement under regulation 1.35(a) as part of today's final rule. Instead, the Commission intends to adopt that requirement in a future final rulemaking.

C. Consideration of Costs and Benefits

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

In July 2010, Congress passed the Dodd-Frank Act which, among other things, establishes a comprehensive regime for the regulation of swaps. The Dodd-Frank Act brings swaps under the Commission's jurisdiction and obligates the Commission to adopt new regulations related to registration and regulation of SDs and MSPs, trade execution and clearing requirements, and swap data recordkeeping and real time reporting. In section 721 of the Dodd-Frank Act, Congress added CEA section 1a(47) to add a definition of the term ''swap.''

In response to Congress's act of placing swaps under the Commission's authority, the Commission is exercising its discretion to amend its regulations to ensure that SDs, MSPs, SEFs, and swaps are subject to the Commission's comprehensive regulatory regime, and in June 2011, proposed to amend parts 1, 5, 7, 8, 15, 18, 21, 36, 41, 140, 145, 155, and 166 to update its regulations accordingly.[119]

As described in the Background, above (section I. of this preamble), some of the amendments contained in this release are technical in nature; for example, they amend various definitions in regulation 1.3 to track the DFA's amendments to the CEA's definitions of the same term, such as futures commission merchants. Another example of a technical change is the deletion of references to derivatives transaction execution facilities, a category of exchange that the DFA eliminated. Other revisions contained in this rulemaking amend recordkeeping and reporting requirements, which presently apply to futures, so that they cover swap transactions as well. An example of this type of change is the revision to parts 15, 18, 21, and 36 to implement DFA's grandfathering and phase-out of exempt boards of trade and exempt commercial markets. Certain amendments in this release are designed to harmonize recordkeeping requirements for various registered entities transacting in swaps. For example, the amendments to §§ 1.31 harmonize part 1 recordkeeping requirements with those applicable to SDs and MSPs under part 23 regulations. Lastly, this rulemaking amends procedures pertaining to the post-execution allocation of bunched orders so that they can be used in respect of swap transactions similarly to how they are currently used for futures transactions.

The benefits and costs that the Commission considers below are those attributable to its amendments of the rules discussed compared to a scenario in which these rules were not amended.

Section 1.31 Books and Records; Keeping and Information

Summary Description

Prior to the amendments made in this final rule, § 1.31 specified the conditions under which records required by the Act of any applicable entity shall be maintained. The section stated that these records shall be kept for a period of five years from the transaction date, must be ''readily accessible'' for the first two years, and stipulated a number of further conditions pertaining to the auditing of record storage systems, storing duplicate copies of records, and other items. As described above in II.A.3, the amendments in this final rule specify that: (1) Required books and records must be kept in their original form (for paper records) or in their native file formats (for electronic records); (2) when books and records are requested by the Commission, they must be produced in a form and on any media specified by the Commission; (3) required records of any swap or related cash or forward transaction must be kept until the ''termination, maturity, expiration, transfer, assignment, or novation date of the transaction'' and then for an additional five-year period; and (4) records of oral communications required to be maintained pursuant to regulation 23.202(a)(1) and (b)(1) must be kept until the ''termination, maturity, expiration, transfer, assignment, or novation date of the transaction'' and then for an additional one-year period.

Benefits

The public and the financial integrity of the markets benefit from this amendment because it promotes retention of metadata (*i.e.,* data about data). This amendment enhances the Commission's forensic capabilities, including the ability to trace communications and transactions. Moreover, requiring entities to retain data in its native file format reduces the likelihood that data could be manipulated or corrupted, either intentionally or unintentionally, which makes it more reliable.

In addition, if entities are not required to store data in its native file format, some entities may choose to store some of their data on paper records or in electronic image formats (such as PDF) which cannot be easily converted into a form that allows it to be read by programs that the Commission sometimes uses for purposes of investigation and analysis. For example, market participants have sometimes submitted large amounts of financial data to the Commission on printed pages arguing that OCR technology makes such pages ''machine readable'' and therefore is compliant with the existing requirements under § 1.31(b)(3)(i). While OCR technology is useful in converting printed text into an electronic form, it has not been similarly helpful in converting financial data provided to the Commission. When market participants have submitted large data sets to the Commission on printed pages, it has been problematic, forcing the Commission to either enter extraordinary amounts of data into its systems manually, an expensive process that introduces the possibility of data entry errors, or to abandon the use of programs that are often helpful in the

[118] *See* 76 FR 33066, 33079–80, June 7, 2011.

[119] 76 FR 33066.

course of investigation, which severely limits the usefulness of that data for investigation purposes.

Requiring all entities subject to regulation 1.31 to retain data in its native file format mitigates the potential that market participants could discard records in an effort to thwart Commission investigations, or that they could do so unintentionally but with similar effect and increases the likelihood that the data will exist in a form that can be converted to meet the Commission's needs. The requirement that entities present that data to the Commission in a format and on a medium requested by the Commission will help to ensure that the Commission is able to obtain data from market participants in a form that it can use effectively for detecting and prosecuting prohibited market activities. And by improving the efficiency and effectiveness of the Commission's enforcement efforts, these requirements help deter fraud and manipulation, and promote the integrity of the markets subject to the jurisdiction of the Commission.

By providing that required written records pertaining to swaps and related cash or forward transactions must be retained for the life of the swap plus five years, the Commission will have the ability to create a sufficient audit trail from which to ascertain and, if necessary recreate, the facts and circumstances giving rise to the transaction, even if the need to do so arises several months or even a few years after the relevant transactions occurred.

Costs

The amended requirement to store electronic records in their native format will likely create additional data storage costs for market participants. The incremental cost of storage depends on whether or not the entity in question was previously storing data in its native format and the number and size of records that must be stored in their native format. The Commission requested but received no data from commenters quantifying such costs. In order to quantify these costs the Commission would need data sufficient to estimate the number of entities that do not store data in its native file format, and the amount of additional data that they would, on average, have to retain in order to store it in its native file format. The Commission does not have that information.

In addition, market participants will have additional storage costs because the rule provides that required swap and related cash and forward transaction data must be retained for the life of the swap plus five years. These costs will depend on the number and tenor of swaps and related cash and forward transactions that an entity enters into. These factors are likely to vary widely among market participants. The Commission does not have adequate information to estimate how many firms are currently storing data in its native format, the number of swap transactions that will be affected by the timelines implemented here, or to estimate their tenor and the storage space required to store related data. Therefore it is not possible to estimate the additional storage space or cost of additional storage.

The requirement that entities submit information to the Commission in a format and on a medium determined by the Commission will create some costs for market participants. Entities that keep data in proprietary systems or in formats that are not read by programs that the Commission uses to aid in its investigations would need to adapt their systems in order to develop this capability. And when requested to do so by the Commission, such entities would have to convert their data into the format requested by the Commission, which creates some incremental costs as well. The Commission cannot estimate these additional costs because it does not have adequate information to estimate the number of entities that would need to adapt their systems in order to allow for data conversion that meets the Commission's needs. Moreover, it does not have information regarding the number of inquiries that will require data conversion, or the amount of time that entities would need to spend converting data when necessary. The latter is likely to vary widely, depending on the data formats currently used by market participants and the presence or absence of standard data conversion software that might assist with such needs.

The rules provides that required swap and related cash and forward transaction data must be retained for the life of the swap plus five years also creates some data migration costs. Entities engaging in long-dated swaps will likely upgrade their recordkeeping systems during the period of time that they are required to keep data related to those swaps and related cash or forward transactions. Such entities will have to implement backward-compatible systems, or will have to reformat older data so that it can be retained and retrieved using newer systems. Either of these approaches will create some cost, however, it is not possible to determine which approach entities are likely to take or the cost that would likely result in either case. Therefore, the Commission is not able to estimate the cost at this time.

Some commenters noted costs that would result from not being allowed to convert paper records to electronic media for storage.[120] In response, the Commission notes that regulation 1.31(b) still provides that paper records stored on micrographic media or electronic storage media (e.g. scanned copies) is sufficient to fulfill the requirements of regulation 1.31(a)(1), and therefore the cost that these commenters noted will not occur. Similarly, the Minneapolis Grain Exchange expressed a concern that amendments to regulations 1.31 and 1.35, taken together, could ''require an electronic and paper copy of the same information,'' leading to unnecessary costs on the part of firms. As stated above, the Commission is not requiring that entities retain both paper and electronic copies of the same information.

The amendments to the requirements for keeping and inspection of records, mandated in this section, create certain costs. It is likely that some SEF members will not have not been subject to regulation 1.31 previously and therefore will need to design written procedures and controls for maintaining their recordkeeping system.[121] For entities that need to develop such procedures and controls for the first time, the Commission estimates a one-time cost of approximately $13,000 to $28,000.[122]

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[120] *See e.g.,* FIA and NFA.

[121] § 1.31(b)(3)(ii).

[122] Calculations in the PRA section rely calculations rely on wage estimates from the Bureau of Labor Statistics. However, for the purposes of the Cost Benefit Considerations section, we have used wage estimates that are taken from the SIFMA ''Report on Management and Professional Earnings in the Securities Industry 2011'' because industry participants are likely to be more familiar with them. Hourly costs are calculated assuming 2,000 hours per year and a multiplier of 5.35 to account for overhead and bonuses. All totals calculated on the basis of cost estimates are rounded to two significant digits.

This estimate assumes 20–40 hours of a compliance attorney's time, 20–40 hours of an intermediate compliance specialist's time, 5–15 hours of a senior database administrator's time, and 5–15 hours of an office manager's time in order to design and implement the written procedures and controls. The average cost for a compliance attorney is $351.24/hour [($131,303 per year)/(2000 hours per year) * 5.35 = $351.24 per hour]. The average cost for an intermediate compliance specialist is $351.24/hour [($58,303 per year)/(2000 hours per year) * 5.35 = $351.24 per hour]. The average cost for a senior database administrator's time is $280.22/hour [($104,755 per year)/(2000 hours per year) * 5.35 = $280.22 per hour]. The average cost for an office manager's time is $229.72/hour [($85,875 per year)/(2000 hours per year) * 5.35 = $229.72 per hour].

In addition, the members of SEFs that have not previously been subject to regulation 1.31 will have to provide a representation to the Commission prior to their initial use of the system.[123] The Commission estimates that such entities will spend approximately 0.5 hours providing the submission, and therefore the estimated cost for the submission is $78.[124]

Consideration of Alternatives

One commenter suggested that the Commission require records to be kept indefinitely.[125] In the Proposal, the Commission did not propose to alter the requirements regarding the length of time during which written records must be retained by relevant entities for any of the transactions that were previously covered by the requirement, and continues to believe that the existing requirements ensure access to relevant records for a reasonable period of time while also limiting costs to market participants. However, the amendments to regulation 1.31 added swaps and related cash and forward transactions to the types of transactions that are covered, and as described above, established a longer recordkeeping requirement for required books and records regarding those transactions. The Commission believes that the long product life of some swaps necessitates longer recordkeeping requirements for related documents and data. However, the Commission anticipates that data related to such transactions will not be needed for enforcement purposes more than five years beyond the time when the swap has been terminated, novated, etc. Therefore, providing that market participants must retain required data more than five years beyond that date would, in the Commission's view, impose unnecessary cost upon market participants without significant added benefit.

The Proposal would have required oral records to be retained by SDs and MSPs until the swap has been terminated, novated, etc., and for five years thereafter, whereas the final rule requires these entities to retain such records until the swap has been terminated, novated, etc., and for a period of one year thereafter. This may create some cost by limiting the Commission's ability to obtain from SDs and MSPs recordings related to events that occurred more than one year ago, which could reduce the Commission's effectiveness in identifying and prosecuting certain violations. However, the Commission anticipates that in most cases, the one year requirementafter the life of the swap, will be sufficient, and notes that the reduced retention requirement reduces storage costs to market participants.

Section 1.35 Records of Commodity Interest and Cash Commodity Transactions Introduction

Prior to this amendment, § 1.35 specified which parties are required to keep records related to commodity futures, commodity options, and cash commodities. The requirements of § 1.35 applied to FCMs, RFEDs, IBs, and members of contract markets. The amendments to regulation 1.35 extend these recordkeeping requirements to swap transactions and to members of SEFs.

As described above in II.A.5, the amended rule also applies the bunched order procedures for futures transactions to swaps, and adds FCMs and IBs to the list of eligible account managers for orders executed on a DCM or SEF, and also adds CTAs, FCMs, and IBs as eligible account managers for orders executed bilaterally.

Benefits

As it explained when adopting similar transactional level recordkeeping requirements for SDs and MSPs, the Commission believes these recordkeeping requirements for swap transactions will contribute to important, though unquantifiable, benefits.[126] More specifically, complete, rigorous transactional recordkeeping is a necessary element to promote market integrity, as well as customer protection, by providing an audit trail of past swap transactions. For, a strong audit trail, among other things:

- Provides a basis for efficiently resolving transactional disputes.
- Facilitates a firm's ability to recognize and manage its risk, thereby enhancing the risk management of the market as a whole.
- Acts as a disincentive to engage in unduly risky, injurious, or illegal conduct in that the conduct will be traceable.
- And, in the event such conduct does occur, provides a mechanism for policing such conduct, both internally as part of a firm's compliance efforts and externally by regulators enforcing applicable laws and regulations.

The rule also applies the procedures for handling bunched orders of futures, to swaps, which enables account managers to reduce transaction costs to customers by executing a single, large transaction on behalf of multiple customers at the same time, and then allocating the positions that were component parts of that transaction to specific customers after the transaction has been executed. In addition, bunched orders provide additional protection to customers against favoritism. In the absence of bunched orders, when an account manager has several customers that each need to take out positions in the same swap, the manager would place several sequential orders for that swap. The series of orders may move the price for that swap, in which case the last customer order would receive a less favorable price than the first customer order. By combining the orders, the manager is more likely to find a single counterparty and a single price for the orders, in which case the account manager can distribute the appropriate number of shares to each account at a constant price per share. No customer is favored over another in such a distribution. This promotes customer protection and the integrity of the financial markets.

In addition, by adding FCMs and IBs to the list of eligible account managers for orders executed on a DCM or SEF, and also adding CTAs, FCMs, and IBs as eligible account managers for orders executed bilaterally, the rule promotes competition among entities that are permitted to execute bunched orders, which in turn, promotes competitive pricing for account managers who want to execute bunched orders. And by promoting competitive pricing, the amendment promotes market efficiency. In addition, by permitting FCMs, IBs, and CTAs to engage in bunched order transactions, the amendment creates benefits for those entities because it allows them to provide an additional service to clients, giving them an additional source of revenue.

Costs

Amendments in this final rule will require SEF members to comply with regulation 1.35, and it is likely that some of those members will not have been subject to § 1.35 previously. The Commission estimates that SEF members that are newly subject to § 1.35 will spend additional time each day compiling and maintaining transaction records. The Commission estimates that the cost of that additional time is

[123] *See* § 1.31(c).

[124] The average wage for an intermediate compliance specialist is $155.96 [($58,303 per year)/(2,000 hours per year) * 5.35 = $155.96]

[125] Mr. Chris Barnard.

[126] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20172 (Apr. 3, 2012).

$236,000 to $393,000 per entity per year.[127]

Also, the amendments in this final rule will require FCMs, RFEDs, IBs, and members of DCMs to comply with the regulation § 1.35 recordkeeping requirements for any swap transactions into which they enter. The Commission estimates that such entities will spend an additional 0.5 hours per swap capturing and maintaining the records required under § 1.35, and therefore estimates that the per-swap cost will be $83.00.[128]

Section 1.3 Definitions

Introduction

As discussed in II.A.1, the Commission is amending and adding several definitions in order to incorporate swaps within the Commission's regulatory framework. Included among them are definitions for ''customer,'' ''futures commission merchant,'' ''member,'' ''net deficit,'' ''proprietary account,'' ''commodity trading advisor,'' ''commodity pool operator,'' ''designated self-regulatory organization,'' ''customer funds,'' ''strike price,'' ''introducing broker,'' ''registered entity,'' ''registrant,'' ''open contract,'' ''physical,'' and ''commodity interest.''

As discussed throughout this release, Congress amended the CEA to address swaps. The amendments to regulation 1.3 (''Definitions'') help effectuate that mandate and do not, in and of themselves, implicate any costs or benefits. Any costs and benefits are associated with substantive regulations that rely upon the revised definitions contained in regulation 1.3.

Section 1.4 Electronic Signatures

Introduction

In its original form, § 1.4 allowed a customer of an FCM or IB, a retail forex customer of an RFED or FCM, and a pool participant or a client of a CTA to use an electronic signature to provide any required signatures under the CEA, as long as the FCM, RFED, IB, CPO, or CTA elects generally to accept electronic signatures for such purposes and ''reasonable safeguards'' are in place. The amended rule published as part of today's final rulemaking extends the benefit of electronic signatures by including SDs, MSPs, and counterparties of SDs and MSPs in the list of entities that may use electronic signatures for acknowledgement of swap transactions.

Benefits

With respect to the protection of market participants and the public, permitting FCMs, IBs, CPOs, CTAs, SDs, and MSPs to utilize electronic signatures when executing swap transactions enables more rapid processing of steps in the transaction process that requires signatures than would be possible if using faxed copies or hard copies for such purposes. This, in turn, reduces costs to market participants by reducing the amount of time they spend handling paperwork and enhances market efficiency by allowing transactions to be confirmed more rapidly. In addition, this facilitates straight through processing of swaps, which provides numerous efficiency and risk reduction benefits.

Costs

The amendment to § 1.4 is permissive, allowing SDs, MSPs, and their counterparties to use electronic signatures if they choose, and also allowing FCM's, IBs, CPOs, and CTAs to use electronic signatures when engaging in swap transactions. The rule does not create any affirmative obligations for market participants, and therefore does not create direct costs to entities subject to § 1.4. Costs to other market participants and the public would only occur if electronic signatures were somehow more susceptible to be falsified or corrupted than non-electronic signatures. The Commission is not aware of any such risk, and believes that it is unlikely, given that electronic signatures are already widely used among market participants, including other registered entities.

Sections 1.33 and 1.37

Introduction

These amended regulations require FCMs, IBs, RFEDs, SEFs, DCMs and members of DCMs to comply with the same recordkeeping functions for swaps that they currently adhere to with respect to futures and commodity option transactions. Regulation 1.33 deals with monthly confirmation statements, and regulation 1.37 deals with customers' names and addresses as well as daily records showing total open long and short contracts.

Benefits

By incorporating swaps into FCM, IB, RFED, DCM, and DCM members' reporting requirements, the rule extends the benefits of such reporting requirements to a new range of transactions, and to additional customers of such entities. The benefits are likely to be increased awareness among market participants of any losses or gains due to their swap transactions, which may contribute to sound risk management. Moreover, the monthly statements and the confirmation statements required by § 1.33 provide customers with additional opportunities to identify potential mistakes made over the course of their transaction that could result in an undesirable outcome, providing further protection to customers of such entities that are clearing swaps. Participants would also be able to view a list of fees charged to their accounts and verify that all are valid charges and would thus be better protected against accidental or fraudulent fees and charges.

The requirements of § 1.37 will ensure that proper records are maintained to identify the rightful owners of customer funds, and that are kept on an omnibus basis, as well as to identify parties who own, guarantee, or exercise control over any customer cleared swap accounts. Proper records regarding the name of individuals or entities that own customer funds, and daily reconciliation of balances in the omnibus account, promote protection of customer funds held by entities that place customer funds in such accounts. Furthermore, by requiring each FCM carrying an omnibus account for any other person to maintain a daily record of the total open long contracts and total open short contracts in each swap, the final rule provides protection for the customers that hold funds in such accounts. The daily records may be used by the FCM to reconcile the omnibus accounts to their individual customer obligations, thus helping to ensure that the omnibus accounts have sufficient funds to meet their customer obligations.

Costs

Costs of this proposal include the cost of compliance on the part of FCMs to compile and deliver monthly statements and confirmations after every transaction. FCMs will bear a one-time cost to design the confirmation statements, swap section of the monthly reports, and to set up automated systems to produce them. The amendment is not likely to necessitate new technology since FCMs can use the systems that produce existing monthly

[127] This is estimated to take 6–10 hours per day (assuming 252 days per year) of the time of an office services supervisor. The average wage for an office services supervisor is $155.96 [($58,303 per year)/(2,000 hours per year) * 5.35 = $155.96]. $155.95 * 6 * 252 = 235,812.31. $155.95 * 10 * 252 = 393,020.52.

[128] This estimates 0.5 hours of time from an office services supervisor. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. $165.25 * 0.5 = $82.63

statements and confirmations to produce statements pertaining to swaps. FCMs, however, will bear some costs designing and setting up their systems to produce swap transaction confirmations and the swap section of monthly statements. The Commission estimates that the per-entity set-up cost will be between $4,900 and $17,000.[129] The reports are likely to be highly automated, which mitigates ongoing costs. Such costs are also likely to be similar in magnitude to those incurred through compliance with § 1.33 as it pertains to futures positions. The Commission estimates that it will cost FCMs approximately $1.40 per swap transaction for the FCM to input the data that is required.[130] The Commission estimates that entities are likely to spend $3,700 to $7,300 monthly in order to maintain the systems and to produce the relevant statements.[131]

Adding the requirement that certain entities maintain records of the name, address, and occupation of customers that have deposited funds with them will not create any set-up costs. The Commission assumes that entities subject to § 1.37 already have systems that incorporate such information.[132] The Commission estimates that the ongoing cost to capture such information is $1,650 to $3,300 per year.[133] The Commission expects that creating the daily report that provides the daily total of open long and short positions in each omnibus account will require some modifications to existing systems. The Commission estimates that this cost will be approximately $2,600 to $9,900.[134] Producing the daily report is likely to be a process that is automated and therefore the Commission does not believe that there will be incremental daily costs to produce the report. In addition, the Commission recognizes that the requirements will obligate FCMs to enter position data into their systems and estimates that this will require approximately 0.2 hours of personnel time per swap transaction, which results in a cost of approximately $33.00 per transaction.[135] In addition, the Commission estimates that for a SEF that will have to keep records of foreign traders' names, addresses, and occupations executing transactions on an exchange, the SEF will spend between $17.00 and $83.00.[136]

Section 1.39 Simultaneous Buying and Selling Orders of Different Principals; Execution of, for and Between Principals

Introduction

As described above in II.A.7, regulation 1.39 permits the member of a contract market to execute simultaneous buy and sell orders for the same contract on behalf of different principals if the orders are executed on the exchange and subject to certain procedures. The amendments to this rule incorporate SEFs and swaps.

The amendments also delete language barring cross trades; such trades are no longer defined under 4c(a) as amended by DFA. This latter amendment is made pursuant to the DFA without the exercise of Commission discretion and therefore is beyond the scope of consideration in this section.

Benefits

Under CEA Section 5(d)(9), DCMs have an obligation to provide a competitive, open, and efficient market. If a member were to match two orders of its own customers without first making it available to the broader market through the steps required in regulation 1.39, the trade would be neither open nor competitive. The trade would, thus, be open to the risk of non-competitive pricing, which could harm one of the two customers involved in the trade and would, at least minimally, detract from price discovery. By requiring that bids or offers related to the member's customer positions are made available to other parties, the rule ensures that they are open and that a member only matches one customer against another in a trade if the terms of that trade are competitive. This protects each customer and also promotes effective price discovery. Incorporating SEFs into regulation § 1.39 extends the same benefits to SEF members, providing improved price discovery, protection for SEF members' customers, and promoting integrity of the financial markets.

Costs

In order to comply with the rules, a SEF member will be required to take certain steps before executing one customer's order against another customer's order. Those additional steps include first offering its customers' bid and offer to the other members of the SEF through open outcry or submission to an electronic platform. Whether its customers' orders are filled against others in the market or against one another, by offering the trade through the exchange the member will be subject to some fees imposed by the exchange that they would not have otherwise experienced. The fees vary significantly based on the market and product. In addition, the requirement that a SEF record these transactions in a manner that ''shows all transaction details required to be captured by the Act, Commission rule, or regulation'' will create additional data capture costs for the SEF. The Commission estimates that the cost will be approximately $17.00 per transaction and storage costs of less than $1 per record.[137]

[129] Estimate assumes 10–30 hours of IT professional time and 2–10 hours of a regulatory attorney's time in order to create and automate the report. The average salary for a senior programmer is $306.86/hour [($114,714 per year)/(2000 hours per year) * 5.35 = $306.86 per hour]. The average salary for a compliance attorney is $351.24/hour [($131,303 per year)/(2000 hours per year) * 5.35 = $351.24 per hour].

[130] The estimates assume an office services supervisor spends 5 minutes per transaction. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. 5/60 * $165.25 = $1.38.

[131] Estimate assumes 2–10 hours monthly of IT personnel time and 2–16 hours of middle office personnel time. The average salary for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour], and the average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. The Commission anticipates that most monthly reports will be sent to clients electronically, but includes an additional $1,000 monthly for paper, postage, and printing costs.

[132] This is estimated to take 1–10 hours of time from IT personnel. The average salary for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour].

[133] The Commission assumes 10–20 hours per year will be required. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. 10 hours * $165.25/hour = $1,652.50; and 20 hours * $165.25/hour = $ 3,305.00.

[134] This estimates 1–3 hours of time from a compliance attorney and 10–40 hours of time from IT personnel. The average compensation for a compliance attorney is $351.24/hour [$131,303 per year/(2,000 hours per year) * 5.35 is $351.24 per hour]. The average compensation for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour]. 1 * $351.24 = $351.24. 3 * $351.24 = $1,053.71. $351.24 * 10 = $2,207.36. $351.24 * 40 = $8,829.43.

[135] The estimate assumes 0.2 hours of labor per transaction from an office services supervisor. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. 0.2 * $165.25 = $33.05.

[136] The estimates assume an office services supervisor spends between 0.1 and 0.5 hours per transaction. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. 0.1 * $165.25 = $16.52; 0.5 * $165.25 = 82.63.

[137] The estimates assume an office services supervisor spends between 0.1 per transaction. The average salary for an office services supervisor is $165.25/hour [($61,776 per year)/(2,000 hours per year) * 5.35 = $165.25 per hour]. 0.1 * $165.25 = $16.52.

Section 1.40 Crop, Market Information Letters, Reports

Introduction

As described above in II.A.8, the changes to § 1.40 incorporate members of a SEF into the requirement that such entities provide to the Commission copies of any circular, telecommunication, or report that they publish or circulate through other entities concerning crop conditions, or market conditions that would tend to affect the price of any commodity.

Benefits

Regulation 1.40 addresses the need for the Commission to have access to any published or circulated information about market-affecting commodity prices for the prevention and/or identification of manipulative behavior such as false reporting. The benefit of extending regulation 1.40 to members of a SEF is that it will give the Commission the same ability to prevent and/or identify similar manipulative activities in connection with any commodity prices underlying the swap transactions that will be executed on a SEF.

Costs

The requirement will create *de minimis* costs for members of a SEF related to printing and postage costs for one copy of such communications when the Commission requests a copy. Such requests are infrequent on a per entity basis and therefore the Commission does not expect most entities to bear such costs frequently.

Section 1.59 Activities of Self-Regulatory Organizations Employees, etc.

Introduction

Regulation 1.59 imposes restrictions on employees and governing board members of SROs that prevent them from disclosing or trading in any contracts traded or cleared by the employing contract market, or in any related commodity interest. Moreover, it prevents such persons from trading on the basis of material non-public information. As discussed above in II.A.9, the Commission is amending regulation 1.59 to include SEFs and swaps.

Benefits

By preventing employees and governing board members from trading in contracts traded or cleared by their employing exchange or other related commodity interests, the rule helps to prevent conflicts of interest that might otherwise incent employees of an exchange to perform their duties in a way that benefits their own investments rather than benefiting the members of the exchange and the public more generally. In doing so, the rule promotes the integrity of financial markets. Moreover, the rule prevents employees and governing board members from trading to their own advantage, using material non-public information. In doing so, the rule protects other market participants that would be on the opposite side of such trades, and would be disadvantaged by not having access to the same material non-public information.

Costs

The amendments adding SEFs and swaps to the entities and instruments referenced in this rule will, as stated above, prevent employees and governing board members of SROs from investing in certain instruments. There will, therefore, be opportunity costs to those employees. The Commission cannot quantify those opportunity costs because it does not have data adequate to determine what investments employees might have made without such restrictions, what return they would expect on those investments compared to their existing investments, or the amount of money such employees have invested. However, the Commission believes that guarding against conflicts of interest at the SROs is an important step to maintaining integrity in the financial markets.

Section 1.63 Service on Self-Regulatory Organization Governing Boards or Committees by Persons With Disciplinary Histories

Introduction

Prior to the amendments adopted in this rule, regulation 1.63 required SROs to maintain a schedule listing all rule violations which constitute disciplinary offences, to submit that schedule to the Commission and to post it in a public place. This final rule amends the rule to specify that the public place in which the SROs must post the schedule is the SRO's Web site.[138]

Benefits

The amendments to regulation 1.63 promote integrity in the financial markets by ensuring that the information contained in the schedule is posted in a public place that fulfills the intent of the obligation, namely, that the SRO can provide notice to members and the general public.

[138] § 1.63(d).

Costs

Many SROs likely already post the schedules on their Web sites. To the extent that SROs were not previously posting the schedule to their Web sites, they will bear the costs associated with posting schedules on their Web sites. However, this cost will be offset by eliminating the need to post the schedule in whatever alternative public place the SRO was previously using. The Commission estimates that the incremental cost is between $18.00 and $220.00.[139]

Section 1.67 Notification of Final Disciplinary Action Involving Financial Harm to a Customer

Introduction

This rule adds that upon any final disciplinary action in which a SEF finds that a member has committed a rule violation, which involved a transaction for a customer that resulted in financial harm to the customer, a SEF, like a DCM, must provide written notice to such member of the disciplinary action taken against that member. This rule additionally requires members of SEFs, like members of DCMs, to provide written notice of the disciplinary action to the customer upon receipt of such notice from the SEF.

Benefits

By requiring members of a SEF to communicate disciplinary actions taken against them to the customers that were impacted by the activities leading to such disciplinary action, the rule promotes integrity in the financial markets. Customers harmed by a member's actions will, if they choose, have an opportunity to bring legal action against the member that has caused financial harm to them and may also choose to take their business to another member. Both consequences are enabled by the rule, and both serve as an incentive to SEF members to avoid any activity that would harm their customers.

Costs

This amendment is an extension of previously existing regulations that now apply to SEFs as well as DCMs. The costs to SEFs will likely be on par with those to DCMs and will be minimal, covering only the cost of communicating disciplinary actions to members. The Commission estimates

[139] Calculations assume that posting the notice will require 5 to 60 minutes of work by non-senior IT personnel. The average salary for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour]. 5/60 * $220.74 = $18.40; 60/60 * $220.74 = $220.74.

that such notification will cost the SEF approximately $350.00 per notification because appropriate personnel will have to draft and send the required communication.

Sections 15.05, 18.05, 21.03, 36.1, 36.2, 36.3, Appendix A to Part 36, and Appendix B to Part 36

Introduction

As described in II.A.15.D, DFA eliminated ECMs and EBOTs and provided a grandfather relief provision for such entities. The amendments here remove references to the sections of the CEA that were deleted by DFA and insert reference to the Grandfather Relief Orders issued by the Commission.

ECMs and EBOTs are allowed to continue operating as such during the period provided by the Grandfather Relief Orders, creating benefits for those entities that intend to register with the Commission as SEFs, and that wish to continue operating as ECMs or EBOTs until they are able to make such registration. However, those benefits are conferred by the Act and the Grandfather Relief Order. The changes here are merely technical edits to ensure that the regulations reflect the changes to the CEA that were made by DFA. Therefore, there are no costs or benefits associated with these changes.

Parts 140 and 145

Introduction

As discussed above in II.A.15.E, the changes to parts 140 and 145 incorporate SEFs and SDRs into existing Commission regulations. The proposed changes would: (1) Facilitate the disclosure of confidential information to SEFs and SDRs in order to effectuate the purposes of the CEA; (2) facilitate publication of information in the **Federal Register** related to the applications for registration of SEFs and SDRs as well as new rules and rule amendments that require additional time to analyze; (3) include SEFs and SDRs in the category of registered entities that may petition the Commission for exemptive relief and no-action interpretive letters; (4) add SEFs and SDRs to the list of entities from which Commission members and employees may not accept employment or compensation; and (5) expand the definition of ''submitter'' by adding SEFs and SDRs to the list of registered entities to which a person's confidential information has been submitted and which, in turn, submit that information to the Commission, and also allows such individuals to request confidential treatment under § 145.9.

Benefits

The amendments described above create the following benefits: (1) By facilitating disclosure of confidential information to SEFs and SDRs, they assist the Commission in performing its regulatory role with respect to swaps, thus providing additional protection to swap market participants, promoting the integrity of financial markets, and promoting protection for the public. (2) Facilitating publication of information in the **Federal Register** related to registration applications for prospective SEFs and SDRs as well as new rule amendments, will assist the Commission when obtaining additional information from the public in order to ensure that its determinations regarding such applications and rules are well-informed. (3) Including SEFs and SDRs in the category of entities that may petition for exemptive relief and no-action interpretive letters gives these entities the opportunity to pursue individualized treatment with respect to Commission regulations in circumstances where they believe such treatment is appropriate, which in turn, gives the Commission the opportunity to grant such relief or to issue a no-action interpretive letter if it believes doing so is not contrary to the public interest or the intent of the regulations for which such relief is sought.

(4) Adding SEFs and SDRs to the list of registered entities from which Commission members and employees may not accept employment or compensation prevents conflicts of interest and in so doing promotes the Commission's ability to protect market participants and the public as well as to promote the integrity of the financial markets. (5) The changes ensure that personal information submitted to SEFs and SDRs is subject to the same protections under the Commission's regulations as personal information submitted to other registered entities.

Costs

SEFs and SDRs may bear some cost due to their obligation to submit personal information that they receive to the Commission. Such submissions will likely be automated and therefore the SEFs and SDRs will bear an initial cost that is necessary to modify their systems to submit the required information, and an ongoing cost to submit it when required. The Commission estimates that the initial cost is between $2,100 and $10,000,[140] and the ongoing cost is between $230 and $460 per month.[141]

The other amendments do not impose affirmative obligations on market participants and therefore do not create costs for them or the public.

List of Subjects

17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 5

Bulk transfers, Commodity pool operators, Commodity trading advisors, Consumer protection, Customer's money, Securities and property, Definitions, Foreign exchange, Minimum financial and reporting requirements, Prohibited transactions in retail foreign exchange, Recordkeeping requirements, Retail foreign exchange dealers, Risk assessment, Special calls, Trading practices.

17 CFR Part 7

Commodity futures, Consumer protection, Registered entity.

17 CFR Part 8

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements, Electronic trading facility.

17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 18

Commodity futures, Reporting and recordkeeping requirements, Grandfather relief order.

[140] This estimates 2–4 hours from a compliance attorney and 10–40 hours from IT personnel. The average salary for a compliance attorney is $351.24/hour [($131,303 per year)/(2000 hours per year) * 5.35 = $351.24 per hour]. The average salary for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour].

[141] This estimates 2–4 hours from a compliance attorney and 10–40 hours from IT personnel. The average salary for a compliance attorney is $351.24/hour [($131,303 per year)/(2000 hours per year) * 5.35 = $351.24 per hour]. The average salary for a programmer is $220.74/hour [($82,518 per year)/(2,000 hours per year) * 5.35 = $220.74 per hour].

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements, Grandfather relief order.

17 CFR Part 22

Brokers, Clearing, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 36

Commodity futures, Electronic trading facility, Eligible commercial entities, Eligible contract participants, Federal financial regulatory authority, Principal-to-principal, Special calls, Systemic market event.

17 CFR Part 38

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 41

Brokers, Reporting and recordkeeping requirements, Security futures products.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

17 CFR Part 145

Confidential business information, Freedom of information.

17 CFR Part 155

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 166

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, under the authority of 7 U.S.C. 1 *et seq.,* the Commodity Futures Trading Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as set forth below:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Amend § 1.3 by:

■ a. Revising paragraphs (a), (b), (e), (g), (h), (k), (n), (p), (q), (r), (s), (t), (x), (y) introductory text, (y)(1), (y)(2) introductory text, (y)(2)(iii)(B), (y)(2)(iii)(C), (y)(2)(v)(B), (y)(2)(v)(C), (y)(2)(vii), (y)(2)(viii), (aa)(1)(i), (aa)(2)(i), (aa)(5), (bb), (cc), (ee), (ff), (gg), (ii), (kk), (mm)(1), (mm)(2) introductory text, (mm)(2)(i), (nn), (oo), (pp), (rr)(2), (ss), (tt), (vv), (xx), and (yy);

■ b. Removing and reserving paragraphs (jj), (ll) and (uu); and

■ c. Adding paragraphs (k), (cccc), (dddd), (eeee), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), (pppp), (qqqq), (rrrr), and (ssss) to read as follows:

§ 1.3 Definitions.

* * * * *

(a) *Board of Trade.* This term means an organized exchange or other trading facility.

(b) *Business day.* This term means any day other than a Sunday or holiday. In all notices required by the Act or by the rules and regulations in this chapter to be given in terms of business days the rule for computing time shall be to exclude the day on which notice is given and include the day on which shall take place the act of which notice is given.

* * * * *

(e) *Commodity.* This term means and includes wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, millfeeds, butter, eggs, Irish potatoes, wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by the first section of Pub. L. 85–839) and motion picture box office receipts (or any index, measure, value or data related to such receipts), and all services, rights and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

* * * * *

(g) *Institutional customer.* This term has the same meaning as ''eligible contract participant'' as defined in section 1a(18) of the Act.

(h) *Contract market; designated contract market.* These terms mean a board of trade designated by the Commission as a contract market under the Act and in accordance with the provisions of part 38 of this chapter.

* * * * *

(k) *Customer.* This term means any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest; *Provided, however,* an owner or holder of a proprietary account as defined in paragraph (y) of this section shall not be deemed to be a customer within the meaning of section 4d of the Act, the regulations that implement sections 4d and 4f of the Act and § 1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a customer within the meaning of the Act and §§ 1.37 and 1.46 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

* * * * *

(n) *Floor broker.* This term means any person:

(1) Who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person—

(i) Any commodity for future delivery, security futures product, or swap; or

(ii) Any commodity option authorized under section 4c of the Act; or

(2) Who is registered with the Commission as a floor broker.

* * * * *

(p) *Futures commission merchant.* This term means:

(1) Any individual, association, partnership, corporation, or trust—

(i) Who is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery; a security futures product; a swap; any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; a commodity option authorized under section 4c of the Act; a leverage transaction authorized under section 19 of the Act; or acting as a counterparty in any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; and

(ii) Who, in connection with any of these activities accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; and

(2) Any person that is registered as a futures commission merchant.

(q) *Member.* This term means:

(1) An individual, association, partnership, corporation, or trust—

(i) Owning or holding membership in, or admitted to membership representation on, a registered entity; or

(ii) Having trading privileges on a registered entity.

(2) A participant in an alternative trading system that is designated as a contract market pursuant to section 5f of the Act is deemed a member of the contract market for purposes of transactions in security futures products through the contract market.

(r) *Net equity.* (1) For futures and commodity option positions, this term means the credit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open futures or commodity option positions of such person.

(2) For swap positions other than commodity option positions, this term means the credit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open swap positions of such person.

(s) *Net deficit.* (1) For futures and commodity option positions, this term means the debit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open futures or commodity option positions of such person.

(2) For swap positions other than commodity option positions, this term means the debit balance which would be obtained by combining the margin balance of any person with the net profit or loss, if any, accruing on the open swap positions of such person.

(t) *Open contracts.* This term means:

(1) Positions in contracts of purchase or sale of any commodity made by or for any person on or subject to the rules of a board of trade for future delivery during a specified month or delivery period that have neither been fulfilled by delivery nor been offset by other contracts of purchase or sale in the same commodity and delivery month;

(2) Positions in commodity option transactions that have not expired, been exercised, or offset; and

(3) Positions in Cleared Swaps, as § 22.1 of this chapter defines that term, that have not been fulfilled by delivery; not been offset; not expired; and not been terminated.

* * * * *

(x) *Floor trader.* This term means any person:

(1) Who, in or surrounding any pit, ring, post or other place provided by a contract market for the meeting of persons similarly engaged, purchases, or sells solely for such person's own account—

(i) Any commodity for future delivery, security futures product, or swap; or

(ii) Any commodity option authorized under section 4c of the Act; or

(2) Who is registered with the Commission as a floor trader.

(y) *Proprietary account.* This term means a commodity futures, commodity option, or swap trading account carried on the books and records of an individual, a partnership, corporation or other type of association:

(1) For one of the following persons, or

(2) Of which ten percent or more is owned by one of the following persons, or an aggregate of ten percent or more of which is owned by more than one of the following persons:

* * * * *

(iii) * * *

(B) The handling of the trades of customers or customer funds of such partnership,

(C) The keeping of records pertaining to the trades of customers or customer funds of such partnership, or

* * * * *

(v) * * *

(B) The handling of the trades of customers or customer funds of such individual, partnership, corporation or association,

(C) The keeping of records pertaining to the trades of customers or customer funds of such individual, partnership, corporation or association, or

* * * * *

(vii) A business affiliate that directly or indirectly controls such individual, partnership, corporation or association; or

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such individual, partnership, corporation or association. *Provided, however,* That an account owned by any shareholder or member of a cooperative association of producers, within the meaning of section 6a of the Act, which association is registered as a futures commission merchant and carries such account on its records, shall be deemed to be an account of a customer and not a proprietary account of such association, unless the shareholder or member is an officer, director or manager of the association.

* * * * *

(aa) * * *

(1) * * *

(i) The solicitation or acceptance of customers' orders (other than in a clerical capacity) or

* * * * *

(2) * * *

(i) The solicitation or acceptance of customers' orders (other than in a clerical capacity) or

* * * * *

(5) A leverage transaction merchant as a partner, officer, employee, consultant, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of leverage customers' orders (other than in a clerical capacity) for leverage transactions as defined in § 31.4(x) of this chapter, or

(ii) The supervision of any person or persons so engaged.

* * * * *

(bb)(1) *Commodity trading advisor.* This term means any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; any person registered with the Commission as a commodity trading advisor; or any person, who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing. The term does not include:

(i) Any bank or trust company or any person acting as an employee thereof;

(ii) Any news reporter, news columnist, or news editor of the print or electronic media or any lawyer, accountant, or teacher;

(iii) Any floor broker or futures commission merchant;

(iv) The publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

(v) The named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan;

(vi) Any contract market; and

(vii) Such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession:

Provided further, That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or

analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.

(2) *Client.* This term, as it relates to a commodity trading advisor, means any person:

(i) To whom a commodity trading advisor provides advice, for compensation or profit, either directly or through publications, writings, or electronic media, as to the value of, or the advisability of trading in, any contract of sale of a commodity for future delivery, security futures product or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; or

(ii) To whom, for compensation or profit, and as part of a regular business, the commodity trading advisor issues or promulgates analyses or reports concerning any of the activities referred to in paragraph (bb)(2)(i) of this section. The term ''client'' includes, without limitation, any subscriber of a commodity trading advisor.

(cc) *Commodity pool operator.* This term means any person engaged in a business which is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; or any person who is registered with the Commission as a commodity pool operator, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

* * * * *

(ee) *Self-regulatory organization.* This term means a contract market (as defined in § 1.3(h)), a swap execution facility (as defined in § 1.3(rrrr)), or a registered futures association under section 17 of the Act.

(ff) *Designated self-regulatory organization.* This term means:

(1) Self-regulatory organization of which a futures commission merchant, an introducing broker, a leverage transaction merchant, a retail foreign exchange dealer, a swap dealer, or a major swap participant is a member; or

(2) If a Commission registrant other than a leverage transaction merchant is a member of more than one self-regulatory organization and such registrant is the subject of an approved plan under § 1.52, then a self-regulatory organization delegated the responsibility by such a plan for monitoring and auditing such registrant for compliance with the minimum financial and related reporting requirements of the self-regulatory organizations of which the registrant is a member, and for receiving the financial reports necessitated by such minimum financial and related reporting requirements from such registrant; or

(3) If a leverage transaction merchant is a member of more than one self-regulatory organization and such leverage transaction merchant is the subject of an approved plan under § 31.28 of this chapter, then a self-regulatory organization delegated the responsibility by such a plan for monitoring and auditing such leverage transaction merchant for compliance with the minimum financial, cover, segregation and sales practice, and related reporting requirements of the self-regulatory organizations of which the leverage transaction merchant is a member, and for receiving the reports necessitated by such minimum financial, cover, segregation and sales practice, and related reporting requirements from such leverage transaction merchant.

(gg) *Customer funds.* This term means, collectively, Cleared Swaps Customer Collateral and futures customer funds.

* * * * *

(ii) *Premium.* This term means the amount agreed upon between the purchaser and seller, or their agents, for the purchase or sale of a commodity option.

(jj) [Reserved]

(kk) *Strike price.* This term means the price, per unit, at which a person may purchase or sell the commodity, swap, or contract of sale of a commodity for future delivery that is the subject of a commodity option: *Provided,* That for purposes of § 1.17, the term strike price means the total price at which a person may purchase or sell the commodity, swap, or contract of sale of a commodity for future delivery that is the subject of a commodity option (*i.e.,* price per unit times the number of units).

(ll) [Reserved]

(mm) * * *

(1) Any person who, for compensation or profit, whether direct or indirect:

(i) Is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option transaction authorized under section 4c; or any leverage transaction authorized under section 19; or who is registered with the Commission as an introducing broker; and

(ii) Does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(2) The term introducing broker shall not include:

(i) Any futures commission merchant, floor broker, associated person, or associated person of a swap dealer or major swap participant acting in its capacity as such, regardless of whether that futures commission merchant, floor broker, or associated person is registered or exempt from registration in such capacity;

* * * * *

(nn) *Guarantee agreement.* This term means an agreement of guarantee in the form set forth in part B or C of Form 1–FR, executed by a registered futures commission merchant or retail foreign exchange dealer, as appropriate, and by an introducing broker or applicant for registration as an introducing broker on behalf of an introducing broker or applicant for registration as an introducing broker in satisfaction of the alternative adjusted net capital requirement set forth in § 1.17(a)(1)(iii).

(oo) *Leverage transaction merchant.* This term means and includes any individual, association, partnership, corporation, trust or other person that is engaged in the business of offering to enter into, entering into or confirming the execution of leverage contracts, or soliciting or accepting orders for leverage contracts, and who accepts leverage customer funds (or extends credit in lieu thereof) in connection therewith.

(pp) *Leverage customer funds.* This term means all money, securities and property received, directly or indirectly by a leverage transaction merchant from, for, or on behalf of leverage customers to margin, guarantee or secure leverage contracts and all money, securities and property accruing to such customers as the result of such contracts, or the

customers' leverage equity. In the case of a long leverage transaction, profit or loss accruing to a leverage customer is the difference between the leverage transaction merchant's current bid price for the leverage contract and the ask price of the leverage contract when entered into. In the case of a short leverage transaction, profit or loss accruing to a leverage customer is the difference between the bid price of the leverage contract when entered into and the leverage transaction merchant's current ask price for the leverage contract.

* * * * *

(rr) * * *

(2) In the case of foreign options customers in connection with open foreign options transactions, money, securities and property representing premiums paid or received, plus any other funds required to guarantee or secure open transactions plus or minus any unrealized gain or loss on such transactions.

(ss) *Foreign board of trade.* This term means any board of trade, exchange or market located outside the United States, its territories or possessions, whether incorporated or unincorporated.

(tt) *Electronic signature.* This term means an electronic sounds, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(uu) [Reserved]

(vv) *Futures account.* This term means an account that is maintained in accordance with the segregation requirements of sections 4d(a) and 4d(b) of the Act and the rules thereunder.

* * * * *

(xx) *Foreign broker.* This term means any person located outside the United States, its territories or possessions who is engaged in soliciting or in accepting orders only from persons located outside the United States, its territories or possessions for the purchase or sale of any commodity interest transaction on or subject to the rules of any designated contract market or swap execution facility and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(yy) *Commodity interest.* This term means:

(1) Any contract for the purchase or sale of a commodity for future delivery;

(2) Any contract, agreement or transaction subject to a Commission regulation under section 4c or 19 of the Act;

(3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act; and

(4) Any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission.

* * * * *

(cccc) *Cleared Swaps Customer.* This term has the meaning provided in § 22.1 of this chapter.

(dddd) *Cleared Swaps Customer Account.* This term has the meaning provided in § 22.1 of this chapter.

(eeee) *Cleared Swaps Customer Collateral.* This term has the meaning provided in § 22.1 of this chapter.

(ffff) *Confirmation.* When used in reference to a futures commission merchant, introducing broker, or commodity trading advisor, this term means documentation (electronic or otherwise) that memorializes specified terms of a transaction executed on behalf of a customer. When used in reference to a swap dealer or major swap participant, this term has the meaning set forth in § 23.500 of this chapter.

(gggg) *Customer Account.* This term references both a Cleared Swaps Customer Account and a Futures Account, as defined by paragraphs (dddd) and (vv) of this section.

(hhhh) *Electronic trading facility.* This term means a trading facility that—

(1) Operates by means of an electronic or telecommunications network; and

(2) Maintains an automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility.

(iiii) *Futures customer.* This term means any person who uses a futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any contract for the purchase of sale of a commodity for future delivery or any option on such contract; *Provided, however,* an owner or holder of a proprietary account as defined in paragraph (y) of this section shall not be deemed to be a futures customer within the meaning of sections 4d(a) and 4d(b) of the Act, the regulations that implement sections 4d and 4f of the Act and § 1.35, and such an owner or holder of such a proprietary account shall otherwise be deemed to be a futures customer within the meaning of the Act and §§ 1.37 and 1.46 and all other sections of these rules, regulations, and orders which do not implement sections 4d and 4f of the Act.

(jjjj) *Futures customer funds.* This term means all money, securities, and property received by a futures commission merchant or by a derivatives clearing organization from, for, or on behalf of, futures customers:

(1) To margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market or derivatives clearing organization, as the case may be, and all money accruing to such futures customers as the result of such contracts; and

(2) In connection with a commodity option transaction on or subject to the rules of a contract market, or derivatives clearing organization, as the case may be:

(i) To be used as a premium for the purchase of a commodity option transaction for a futures customer;

(ii) As a premium payable to a futures customer;

(iii) To guarantee or secure performance of a commodity option by a futures customer; or

(iv) Representing accruals (including, for purchasers of a commodity option for which the full premium has been paid, the market value of such commodity option) to a futures customer.

(3) Notwithstanding paragraphs (1) and (2) of this definition, the term ''futures customer funds'' shall exclude money, securities or property held to margin, guarantee or secure security futures products held in a securities account, and all money accruing as the result of such security futures products.

(kkkk) *Order.* This term means an instruction or authorization provided by a customer to a futures commission merchant, introducing broker or commodity trading advisor regarding trading in a commodity interest on behalf of the customer.

(llll) *Organized exchange.* This term means a trading facility that—

(1) Permits trading—

(i) By or on behalf of a person that is not an eligible contract participant; or

(ii) By persons other than on a principal-to-principal basis; or

(2) Has adopted (directly or through another nongovernmental entity) rules that—

(i) Govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; and

(ii) Include disciplinary sanctions other than the exclusion of participants from trading.

(mmmm) *Prudential regulator.* This term has the meaning given to the term in section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve

System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant. The term also includes the Federal Deposit Insurance Corporation, with respect to any financial company as defined in section 201 of the Dodd-Frank Wall Street Reform and Consumer Protection Act or any insured depository institution under the Federal Deposit Insurance Act, and with respect to each affiliate of any such company or institution.

(nnnn) *Registered entity.* This term means:

(1) A board of trade designated as a contract market under section 5 of the Act;

(2) A derivatives clearing organization registered under section 5b of the Act;

(3) A board of trade designated as a contract market under section 5f of the Act;

(4) A swap execution facility registered under section 5h of the Act;

(5) A swap data repository registered under section 21 of the Act; and

(6) With respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.

(oooo) *Registrant.* This term means: a commodity pool operator; commodity trading advisor; futures commission merchant; introducing broker; leverage transaction merchant; floor broker; floor trader; major swap participant; retail foreign exchange dealer; or swap dealer that is subject to these regulations; or an associated person of any of the foregoing other than an associated person of a swap dealer or major swap participant.

(pppp) *Retail forex customer.* This term means a person, other than an eligible contract participant as defined in section 1a(18) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.

(qqqq) *Swap data repository.* This term means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.

(rrrr) *Swap execution facility.* This term means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

(1) Facilitates the execution of swaps between persons; and

(2) Is not a designated contract market.

(ssss) *Trading facility.* This term has the meaning set forth in section 1a(51) of the Act.

■ 3. Revise § 1.4 to read as follows:

§ 1.4 Electronic signatures, acknowledgments and verifications.

For purposes of complying with any provision in the Commodity Exchange Act or the rules or regulations in this Chapter I that requires a swap transaction to be acknowledged by a swap dealer or major swap participant or a document to be signed or verified by a customer of a futures commission merchant or introducing broker, a retail forex customer of a retail foreign exchange dealer or futures commission merchant, a pool participant or a client of a commodity trading advisor, or a counterparty of a swap dealer or major swap participant, an electronic signature executed by the customer, retail forex customer, participant, client, counterparty, swap dealer, or major swap participant will be sufficient, if the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, or major swap participant elects generally to accept electronic signatures, acknowledgments or verifications or another Commission rule permits the use of electronic signatures for the purposes listed above; *Provided, however,* That the electronic signature must comply with applicable Federal laws and other Commission rules; And, *Provided further,* That the futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, or major swap participant must adopt and use reasonable safeguards regarding the use of electronic signatures, including at a minimum safeguards employed to prevent alteration of the electronic record with which the electronic signature is associated, after such record has been electronically signed.

■ 4. Revise paragraph (a)(4) of § 1.16 to read as follows:

§ 1.16 Qualifications and reports of accountants.

(a) * * *

(4) *Customer.* The term ''customer'' means customer (as defined in § 1.3(k)) and includes a foreign futures or foreign options customer (as defined in § 30.1(c) of this chapter).

* * * * *

■ 5. Amend § 1.17 by:

■ a. Removing and reserving paragraph (a)(1)(ii);

■ b. Removing from paragraph (c)(1)(iii) the term ''physical'' in all places it appears and adding in its place the term ''commodity'';

■ c. Revising paragraph (c)(5)(ii)(A);

■ d. Removing from paragraph (c)(5)(xi) the term ''physical'' and adding in its place the term ''commodity''; and

■ e. Revising paragraph (c)(5)(xiii)(C).

The revisions read as follows:

§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.

(a)(1)(i) * * *

(ii) [Reserved]

* * * * *

(c) * * *

(5) * * *

(ii) * * *

(A) Inventory which is currently registered as deliverable on a contract market and covered by an open futures contract or by a commodity option on a physical commodity—No charge.

* * * * *

(xiii) * * *

(C) A foreign broker that has been granted comparability relief pursuant to § 30.10 of this chapter, *Provided, however,* that the amount of the unsecured receivable not subject to the five percent capital charge is no greater than 150 percent of the current amount required to maintain futures and options positions in accounts with the foreign broker, or 100 percent of such greater amount required to maintain futures and option positions in the accounts at any time during the previous six-month period, and *Provided, that,* in the case of the foreign futures or foreign options secured amount, as § 1.3(rr) defines such term, such account is treated in accordance with the special requirements of the applicable Commission order issued under § 30.10 of this chapter.

* * * * *

■ 6. Revise § 1.20 to read as follows:

§ 1.20 Futures customer funds to be segregated and separately accounted for.

(a) All futures customer funds shall be separately accounted for and segregated as belonging to futures customers. Such futures customer funds when deposited with any bank, trust company, derivatives clearing organization or another futures commission merchant shall be deposited under an account name which clearly identifies them as

such and shows that they are segregated as required by sections 4d(a) and 4d(b) of the Act and this part. Each registrant shall obtain and retain in its files for the period provided in § 1.31 a written acknowledgment from such bank, trust company, derivatives clearing organization, or futures commission merchant, that it was informed that the futures customer funds deposited therein are those of futures customers and are being held in accordance with the provisions of the Act and this part: *Provided, however,* that an acknowledgment need not be obtained from a derivatives clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as futures customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of futures customers. Under no circumstances shall any portion of futures customer funds be obligated to a derivatives clearing organization, any member of a contract market, a futures commission merchant, or any depository except to purchase, margin, guarantee, secure, transfer, adjust or settle trades, contracts or commodity option transactions of futures customers. No person, including any derivatives clearing organization or any depository, that has received futures customer funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any such funds as belonging to any person other than the futures customers of the futures commission merchant which deposited such funds.

(b) All futures customer funds received by a derivatives clearing organization from a member of the derivatives clearing organization to purchase, margin, guarantee, secure or settle the trades, contracts or commodity options of the clearing member's futures customers and all money accruing to such futures customers as the result of trades, contracts or commodity options so carried shall be separately accounted for and segregated as belonging to such futures customers, and a derivatives clearing organization shall not hold, use or dispose of such futures customer funds except as belonging to such futures customers. Such futures customer funds when deposited in a bank or trust company shall be deposited under an account name which clearly shows that they are the futures customer funds of the futures customers of clearing members, segregated as required by sections 4d(a) and 4d(b) of the Act and these regulations. The derivatives clearing organization shall obtain and retain in its files for the period provided by § 1.31 an acknowledgment from such bank or trust company that it was informed that the futures customer funds deposited therein are those of futures customers of its clearing members and are being held in accordance with the provisions of the Act and these regulations.

(c) Each futures commission merchant shall treat and deal with the futures customer funds of a futures customer as belonging to such futures customer. All futures customer funds shall be separately accounted for, and shall not be commingled with the money, securities or property of a futures commission merchant or of any other person, or be used to secure or guarantee the trades, contracts or commodity options, or to secure or extend the credit, of any person other than the one for whom the same are held: *Provided, however,* That futures customer funds treated as belonging to the futures customers of a futures commission merchant may for convenience be commingled and deposited in the same account or accounts with any bank or trust company, with another person registered as a futures commission merchant, or with a derivatives clearing organization, and that such share thereof as in the normal course of business is necessary to purchase, margin, guarantee, secure, transfer, adjust, or settle the trades, contracts or commodity options of such futures customers or resulting market positions, with the derivatives clearing organization or with any other person registered as a futures commission merchant, may be withdrawn and applied to such purposes, including the payment of premiums to option grantors, commissions, brokerage, interest, taxes, storage and other fees and charges, lawfully accruing in connection with such trades, contracts or commodity options: *Provided further,* That futures customer funds may be invested in instruments described in § 1.25.

■ 7. Revise § 1.21 to read as follows:

§ 1.21 Care of money and equities accruing to futures customers.

All money received directly or indirectly by, and all money and equities accruing to, a futures commission merchant from any derivatives clearing organization or from any clearing member or from any member of a contract market incident to or resulting from any trade, contract or commodity option made by or through such futures commission merchant on behalf of any futures customer shall be considered as accruing to such futures customer within the meaning of the Act and these regulations. Such money and equities shall be treated and dealt with as belonging to such futures customer in accordance with the provisions of the Act and these regulations. Money and equities accruing in connection with futures customers' open trades, contracts, or commodity options need not be separately credited to individual accounts but may be treated and dealt with as belonging undivided to all futures customers having open trades, contracts, or commodity option positions which if closed would result in a credit to such futures customers.

■ 8. Revise § 1.22 to read as follows:

§ 1.22 Use of futures customer funds restricted.

No futures commission merchant shall use, or permit the use of, the futures customer funds of one futures customer to purchase, margin, or settle the trades, contracts, or commodity options of, or to secure or extend the credit of, any person other than such futures customer. Futures customer funds shall not be used to carry trades or positions of the same futures customer other than in commodities or commodity options traded through the facilities of a contract market.

■ 9. Revise § 1.23 to read as follows:

§ 1.23 Interest of futures commission merchant in segregated futures customer funds; additions and withdrawals.

The provisions in section 4d(a) and 4d(b) of the Act and the provision in § 1.20(c), which prohibit the commingling of futures customer funds with the funds of a futures commission merchant, shall not be construed to prevent a futures commission merchant from having a residual financial interest in the futures customer funds, segregated as required by the Act and the rules in this part and set apart for the benefit of futures customers; nor shall such provisions be construed to prevent a futures commission merchant from adding to such segregated futures customer funds such amount or amounts of money, from its own funds or unencumbered securities from its own inventory, of the type set forth in § 1.25, as it may deem necessary to ensure any and all futures customers' accounts from becoming undersegregated at any time. The books and records of a futures commission merchant shall at all times accurately reflect its interest in the segregated funds. A futures commission merchant may draw upon such segregated funds to its own order, to the extent of its actual interest therein, including the

withdrawal of securities held in segregated safekeeping accounts held by a bank, trust company, contract market, derivatives clearing organization or other futures commission merchant. Such withdrawal shall not result in the funds of one futures customer being used to purchase, margin or carry the trades, contracts or commodity options, or extend the credit of any other futures customer or other person.

■ 10. Revise § 1.24 to read as follows:

§ 1.24 Segregated funds; exclusions therefrom.

Money held in a segregated account by a futures commission merchant shall not include: (a) Money invested in obligations or stocks of any derivatives clearing organization or in memberships in or obligations of any contract market; or

(b) Money held by any derivatives clearing organization which it may use for any purpose other than to purchase, margin, guarantee, secure, transfer, adjust, or settle the contracts, trades, or commodity options of the futures customers of such futures commission merchant.

■ 11. Revise paragraphs (c)(3) and (e) of § 1.25 to read as follows:

§ 1.25 Investment of customer funds.

* * * * *

(c) * * *

(3) A futures commission merchant or derivatives clearing organization shall maintain the confirmation relating to the purchase in its records in accordance with § 1.31 and note the ownership of fund shares (by book-entry or otherwise) in a custody account of the futures commission merchant or derivatives clearing organization in accordance with §§ 1.26 and 22.5 of this chapter. The futures commission merchant or the derivatives clearing organization shall obtain the acknowledgment letter required by §§ 1.26 and 22.5 of this chapter from an entity that has substantial control over the fund shares purchased with customer funds and has the knowledge and authority to facilitate redemption and payment or transfer of the customer funds. Such entity may include the fund sponsor or depository acting as custodian for fund shares.

* * * * *

(e) *Deposit of firm-owned securities into segregation.* A futures commission merchant shall not be prohibited from directly depositing unencumbered securities of the type specified in this section, which it owns for its own account, into a segregated safekeeping account or from transferring any such securities from a segregated account to its own account, up to the extent of its residual financial interest in customers' segregated funds; *provided, however,* that such investments, transfers of securities, and disposition of proceeds from the sale or maturity of such securities are recorded in the record of investments required to be maintained by § 1.27. All such securities may be segregated in safekeeping only with a bank, trust company, derivatives clearing organization, or other registered futures commission merchant. Furthermore, for purposes of §§ 1.25, 1.27, 1.28, and 1.29, investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into such segregated account shall be considered customer funds until such investments are withdrawn from segregation. Investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to § 1.26 shall be considered futures customer funds until such investments are withdrawn from segregation. Investments permitted by § 1.25 that are owned by the futures commission merchant and deposited into a segregated account pursuant to § 22.5 of this chapter shall be considered Cleared Swaps Customer Collateral until such investments are withdrawn from segregation.

* * * * *

■ 12. Revise § 1.26 to read as follows:

§ 1.26 Deposit of instruments purchased with futures customer funds.

(a) Each futures commission merchant who invests futures customer funds in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such futures customers. Such instruments, when deposited with a bank, trust company, derivatives clearing organization or another futures commission merchant, shall be deposited under an account name which clearly shows that they belong to futures customers and are segregated as required by the Act and this part. Each futures commission merchant upon opening such an account shall obtain and retain in its files an acknowledgment from such bank, trust company, derivatives clearing organization or other futures commission merchant that it was informed that the instruments belong to futures customers and are being held in accordance with the provisions of the Act and this part. *Provided, however,* that an acknowledgment need not be obtained from a derivatives clearing organization that has adopted and submitted to the Commission rules that provide for the segregation as futures customer funds, in accordance with all relevant provisions of the Act and the rules and orders promulgated thereunder, of all funds held on behalf of futures customers and all instruments purchased with futures customer funds. Such acknowledgment shall be retained in accordance with § 1.31. Such bank, trust company, derivatives clearing organization or other futures commission merchant shall allow inspection of such obligations at any reasonable time by representatives of the Commission.

(b) Each derivatives clearing organization which invests money belonging or accruing to futures customers of its clearing members in instruments described in § 1.25 shall separately account for such instruments and segregate such instruments as belonging to such futures customers. Such instruments, when deposited with a bank or trust company, shall be deposited under an account name which will clearly show that they belong to futures customers and are segregated as required by the Act and this part. Each derivatives clearing organization upon opening such an account shall obtain and retain in its files a written acknowledgment from such bank or trust company that it was informed that the instruments belong to futures customers of clearing members and are being held in accordance with the provisions of the Act and this part. Such acknowledgment shall be retained in accordance with § 1.31. Such bank or trust company shall allow inspection of such instruments at any reasonable time by representatives of the Commission.

■ 13. Revise paragraph (a) introductory text and paragraph (a)(6) of § 1.27 to read as follows:

§ 1.27 Record of investments.

(a) Each futures commission merchant which invests customer funds, and each derivatives clearing organization which invests customer funds of its clearing members' customers, shall keep a record showing the following:

* * * * *

(6) The date on which such investments were liquidated or otherwise disposed of and the amount of money or current market value of securities received on such disposition, if any; and

* * * * *

■ 14. Revise § 1.29 to read as follows:

§ 1.29 Increment or interest resulting from investment of customer funds.

The investment of customer funds in instruments described in § 1.25 shall not

prevent the futures commission merchant or derivatives clearing organization so investing such funds from receiving and retaining as its own any increment or interest resulting therefrom.

■ 15. Revise § 1.30 to read as follows:

§ 1.30 Loans by futures commission merchants; treatment of proceeds.

Nothing in the regulations in this chapter shall prevent a futures commission merchant from lending its own funds to customers on securities and property pledged by such customers, or from repledging or selling such securities and property pursuant to specific written agreement with such customers. The proceeds of such loans used to purchase, margin, guarantee, or secure the trades, contracts, or commodity options of customers shall be treated and dealt with by a futures commission merchant as belonging to such customers, in accordance with and subject to the provisions of the Act and these regulations.

■ 16. Amend § 1.31 by revising paragraphs (a), (b) introductory text, (b)(2)(iii), and (b)(3)(i), to read as follows:

§ 1.31 Books and records; keeping and inspection.

(a)(1) All books and records required to be kept by the Act or by these regulations shall be kept in their original form (for paper records) or native file format (for electronic records) for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period; *Provided, however,* That records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date. Records of oral communications kept pursuant to § 23.202(a)(1) and (b)(1) of this chapter shall be kept for a period of one year. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice. For purposes of this section, native file format means an electronic file that exists in the format in which it was originally created.

(2) Persons required to keep books and records by the Act or by these regulations shall produce such records in a form specified by any representative of the Commission. Such production shall be made, at the expense of the person required to keep the book or record, to a Commission representative upon the representative's request. Instead of furnishing a copy, such person may provide the original book or record for reproduction, which the representative may temporarily remove from such person's premises for this purpose. All copies or originals shall be provided promptly. Upon request, the Commission representative shall issue a receipt provided by such person for any copy or original book or record received. At the request of the Commission representative, such person shall, upon the return thereof, issue a receipt for any copy or original book or record returned by the representative.

(b) Except as provided in paragraph (d) of this section, books and records required to be kept by the Act or by these regulations may be stored on either ''micrographic media'' (as defined in paragraph (b)(1)(i) of this section) or ''electronic storage media'' (as defined in paragraph (b)(1)(ii) of this section) for the required time period under the conditions set forth in this paragraph (b); *Provided, however,* For electronic records, such storage media must preserve the native file format of the electronic records as required by paragraph (a)(1) of this section.

* * * * *

(2) * * *

(iii) Keep only Commission-required records on the individual medium employed (*e.g.,* a disk or sheets of microfiche);

* * * * *

(3) * * *

(i) Be ready at all times to provide, and immediately provide at the expense of the person required to keep such records, copies of such records on such compatible data processing media as defined in § 15.00(d) of this chapter which any representative of the Commission or the Department of Justice may request. Records must use a format and coding structure specified in the request.

* * * * *

■ 17. Revise paragraphs (a)(1), (a)(2), (a)(3), and (b) of § 1.32 to read as follows:

§ 1.32 Segregated account; daily computation and record.

(a) * * *

(1) The total amount of futures customer funds on deposit in segregated accounts on behalf of futures customers;

(2) The amount of such futures customer funds required by the Act and these regulations to be on deposit in segregated accounts on behalf of such futures customers; and

(3) The amount of the futures commission merchant's residual interest in such futures customer funds.

(b) In computing the amount of futures customer funds required to be in segregated accounts, a futures commission merchant may offset any net deficit in a particular futures customer's account against the current market value of readily marketable securities, less applicable percentage deductions (*i.e.,* ''securities haircuts'') as set forth in Rule 15c3–1(c)(2)(vi) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(2)(vi)), held for the same futures customer's account. The futures commission merchant must maintain a security interest in the securities, including a written authorization to liquidate the securities at the futures commission merchant's discretion, and must segregate the securities in a safekeeping account with a bank, trust company, derivatives clearing organization, or another futures commission merchant. For purposes of this section, a security will be considered readily marketable if it is traded on a ''ready market'' as defined in Rule 15c3–1(c)(11)(i) of the Securities and Exchange Commission (17 CFR 240.15c3–1(c)(11)(i)).

* * * * *

■ 18. Amend § 1.33 by:

■ a. Revising paragraphs (a) introductory text, (a)(1) introductory text, and (a)(1)(iii);

■ b. Removing paragraph (a)(1)(iv);

■ c. Revising paragraphs (a)(2) introductory text, (a)(2)(i), (a)(2)(ii), and (a)(2)(iv);

■ d. Adding paragraphs (a)(3) and (a)(4);

■ e. Revising paragraph (b) introductory text, and (b)(1);

■ f. Redesignating paragraphs (b)(2) through (b)(4) as paragraphs (b)(3) through (b)(5);

■ g. Adding a new paragraph (b)(2);

■ h. Revising newly designated paragraphs (b)(3)(i), (b)(3)(iv), (b)(4), and (b)(5); and

■ i. Revising paragraph (d) introductory text.

The revisions and additions read as follows:

§ 1.33 Monthly and confirmation statements.

(a) *Monthly statements.* Each futures commission merchant must promptly furnish in writing to each customer, and to each foreign futures or foreign options customer, as defined by § 30.1 of this chapter, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open contracts at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three

months, a statement which clearly shows:

(1) For each commodity futures customer and foreign futures or foreign options customer position—

* * * * *

(iii) Any futures customer funds or foreign futures or foreign options secured amount, as defined by § 1.3(rr), carried with the futures commission merchant.

(2) For each commodity option position and foreign option position—

(i) All commodity options and foreign options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;

(ii) The open commodity option and foreign option positions carried for such customer or foreign futures or foreign options customer as of the end of the monthly reporting period, identified by underlying futures contract or underlying commodity, strike price, transaction date, and expiration date;

* * * * *

(iv) Any related customer funds carried in such customer's account(s) or any related foreign futures or foreign options secured amount carried in the account(s) of a foreign futures or foreign options customer.

(3) For each Cleared Swaps Customer position—

(i) The Cleared Swaps, as § 22.1 of this chapter defines that term, carried by the futures commission merchant for the Cleared Swaps Customer;

(ii) The net unrealized profits or losses in all Cleared Swaps marked to the market;

(iii) Any Cleared Swaps Customer Collateral carried with the futures commission merchant; and

(4) A detailed accounting of all financial charges and credits to customers and foreign futures or foreign options customers, during the monthly reporting period, including all customer funds and any foreign futures or foreign options secured amount, received from or disbursed to customers or foreign futures or foreign options customers, as well as realized profits and losses.

(b) *Confirmation statement.* Each futures commission merchant must, not later than the next business day after any commodity interest or commodity option transaction, including any foreign futures or foreign options transactions, furnish to each customer or foreign futures or foreign options customer:

(1) A written confirmation of each commodity futures transaction caused to be executed by it for the customer.

(2) A written confirmation of each Cleared Swap carried by the futures commission merchant, containing at least the following information:

(i) The unique swap identifier, as required by § 45.4(a) of this chapter, for each Cleared Swap and the date each Cleared Swap was executed;

(ii) The product name of each Cleared Swap;

(iii) The price at which the Cleared Swap was executed;

(iv) The date of maturity for each Cleared Swap; and

(v) The derivatives clearing organization through which it is cleared.

(3) A written confirmation of each commodity option transaction, containing at least the following information:

(i) The customer's account identification number;

* * * * *

(iv) The underlying futures contract or underlying commodity;

* * * * *

(4) Upon the expiration or exercise of any commodity option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the option involved, and, in the case of exercise, the details of the futures or physical position which resulted therefrom including, if applicable, the final trading date of the contract for future delivery underlying the option.

(5) Notwithstanding the provisions of paragraphs (b)(1) through (b)(4) of this section, a commodity interest transaction that is caused to be executed for a commodity pool need be confirmed only to the operator of the commodity pool.

* * * * *

(d) *Controlled accounts.* With respect to any account controlled by any person other than the customer for whom such account is carried, each futures commission merchant shall:

* * * * *

■ 19. Revise § 1.34 to read as follows:

§ 1.34 Monthly record, ''point balance''.

(a) With respect to commodity futures transactions, each futures commission merchant shall prepare, and retain in accordance with the requirements of § 1.31, a statement commonly known as a ''point balance,'' which accrues or brings to the official closing price, or settlement price fixed by the clearing organization, all open contracts of customers as of the last business day of each month or of any regular monthly date selected: *Provided, however,* That a futures commission merchant who carries part or all of customers' open contracts with other futures commission merchants on an ''instruct basis'' will be deemed to have met the requirements of this section as to open contracts so carried if a monthly statement is prepared which shows that the prices and amounts of such contracts long and short in the customers' accounts are in balance with those in the carrying futures commission merchants' accounts, and such statements are retained in accordance with the requirements of § 1.31.

(b) With respect to commodity option transactions, each futures commission merchant shall prepare, and retain in accordance with the requirements of § 1.31, a listing in which all open commodity option positions carried for customers are marked to the market. Such listing shall be prepared as of the last business day of each month, or as of any regular monthly date selected, and shall be by put or by call, by underlying contract for future delivery (by delivery month) or underlying commodity (by option expiration date), and by strike price.

■ 20. Section 1.35 is revised to read as follows:

§ 1.35 Records of commodity interest and cash commodity transactions.

(a) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities.* Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and cash commodities. Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall retain the required records, in accordance with the requirements of § 1.31, and produce them for inspection and furnish true and correct information and reports as to the contents or the meaning thereof, when and as requested by an authorized representative of the Commission or the United States Department of Justice. Included among such records shall be all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records, which have been prepared in the course of its business of dealing in commodity interests and cash

commodities. Among such records each member of a designated contract market or swap execution facility must retain and produce for inspection are all documents on which trade information is originally recorded, whether or not such documents must be prepared pursuant to the rules or regulations of either the Commission, the designated contract market or the swap execution facility. For purposes of this section, such documents are referred to as ''original source documents.''

(b) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets and swap execution facilities: Recording of customers' orders.* (1) Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, and each member of a designated contract market or swap execution facility receiving a customer's order that cannot immediately be entered into a trade matching engine shall immediately upon receipt thereof prepare a written record of the order including the account identification, except as provided in paragraph (b)(5) of this section, and order number, and shall record thereon, by timestamp or other timing device, the date and time, to the nearest minute, the order is received, and in addition, for commodity option orders, the time, to the nearest minute, the order is transmitted for execution.

(2)(i) Each member of a designated contract market who on the floor of such designated contract market receives a customer's order which is not in the form of a written record including the account identification, order number, and the date and time, to the nearest minute, the order was transmitted or received on the floor of such designated contract market, shall immediately upon receipt thereof prepare a written record of the order in non-erasable ink, including the account identification, except as provided in paragraph (b)(5) of this section, and order number and shall record thereon, by timestamp or other timing device, the date and time, to the nearest minute, the order is received.

(ii) Except as provided in paragraph (b)(3) of this section:

(A) Each member of a designated contract market who on the floor of such designated contract market receives an order from another member present on the floor which is not in the form of a written record shall, immediately upon receipt of such order, prepare a written record of the order or obtain from the member who placed the order a written record of the order, in non-erasable ink including the account identification and order number and shall record thereon, by time-stamp or other timing device, the date and time, to the nearest minute, the order is received; or

(B) When a member of a designated contract market present on the floor places an order, which is not in the form of a written record, for his own account or an account over which he has control, with another member of such designated contract market for execution:

(*1*) The member placing such order immediately upon placement of the order shall record the order and time of placement to the nearest minute on a sequentially-numbered trading card maintained in accordance with the requirements of paragraph (f) of this section;

(*2*) The member receiving and executing such order immediately upon execution of the order shall record the time of execution to the nearest minute on a trading card or other record maintained pursuant to the requirements of paragraph (f) of this section; and

(*3*) The member receiving and executing the order shall return such trading card or other record to the member placing the order. The member placing the order then must submit together both of the trading cards or other records documenting such trade to designated contract market personnel or the clearing member.

(3)(i) The requirements of paragraph (b)(2)(ii) of this section will not apply if a designated contract market maintains in effect rules which provide for an exemption where:

(A) A member of a designated contract market places with another member of such designated contract market an order that is part of a spread transaction;

(B) The member placing the order personally executes one or more legs of the spread; and

(C) The member receiving and executing such order immediately upon execution of the order records the time of execution to the nearest minute on his trading card or other record maintained in accordance with the requirements of paragraph (f) of this section.

(ii) Each contract market shall, as part of its trade practice surveillance program, conduct surveillance for compliance with the recordkeeping and other requirements under paragraphs (b)(2) and (3) of this section, and for trading abuses related to the execution of orders for members present on the floor of the contract market.

(4) Each member of a designated contract market reporting the execution from the floor of the designated contract market of a customer's order or the order of another member of the designated contract market received in accordance with paragraphs (b)(2)(i) or (b)(2)(ii)(A) of this section, shall record on a written record of the order, including the account identification, except as provided in paragraph (b)(5) of this section, and order number, by time-stamp or other timing device, the date and time to the nearest minute such report of execution is made. Each member of a designated contract market shall submit the written records of customer orders or orders from other designated contract market members to designated contract market personnel or to the clearing member responsible for the collection of orders prepared pursuant to this paragraph. The execution price and other information reported on the order tickets must be written in non-erasable ink.

(5) *Post-execution allocation of bunched orders.* Specific customer account identifiers for accounts included in bunched orders executed on designated contract markets or swap execution facilities need not be recorded at time of order placement or upon report of execution if the requirements of paragraphs (b)(5)(i) through (v) of this section are met. Specific customer account identifiers for accounts included in bunched orders involving swaps need not be included in confirmations or acknowledgments provided by swap dealers or major swap participants pursuant to § 23.501(a) of this chapter if the requirements of paragraphs (b)(5)(i) through (v) of this section are met.

(i) *Eligible account managers for orders executed on designated contract markets or swap execution facilities.* The person placing and directing the allocation of an order eligible for post-execution allocation must have been granted written investment discretion with regard to participating customer accounts. The following persons shall qualify as eligible account managers for trades executed on designated contract markets or swap execution facilities:

(A) A commodity trading advisor registered with the Commission pursuant to the Act or excluded or exempt from registration under the Act or the Commission's rules, except for entities exempt under § 4.14(a)(3) of this chapter;

(B) An investment adviser registered with the Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940 or with a state pursuant to applicable state law or excluded or exempt from registration under such Act or applicable state law or rule;

(C) A bank, insurance company, trust company, or savings and loan association subject to federal or state regulation;

(D) A foreign adviser that exercises discretionary trading authority solely over the accounts of non-U.S. persons, as defined in § 4.7(a)(1)(iv) of this chapter;

(E) A futures commission merchant registered with the Commission pursuant to the Act; or

(F) An introducing broker registered with the Commission pursuant to the Act.

(ii) *Eligible account managers for orders executed bilaterally.* The person placing and directing the allocation of an order eligible for post-execution allocation must have been granted written investment discretion with regard to participating customer accounts. The following persons shall qualify as eligible account managers for trades executed bilaterally:

(A) A commodity trading advisor registered with the Commission pursuant to the Act or excluded or exempt from registration under the Act or the Commission's rules, except for entities exempt under § 4.14(a)(3) of this chapter;

(B) A futures commission merchant registered with the Commission pursuant to the Act; or

(C) An introducing broker registered with the Commission pursuant to the Act.

(iii) *Information.* Eligible account managers shall make the following information available to customers upon request:

(A) The general nature of the allocation methodology the account manager will use;

(B) Whether accounts in which the account manager may have any interest may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare its results with those of other comparable customers and, if applicable and consistent with § 155.3(a)(1) and § 155.4(a)(1) of this chapter, any account in which the account manager has an interest.

(iv) *Allocation.* Orders eligible for post-execution allocation must be allocated by an eligible account manager in accordance with the following:

(A) Allocations must be made as soon as practicable after the entire transaction is executed, but in any event no later than the following times: For cleared trades, account managers must provide allocation information to futures commission merchants no later than a time sufficiently before the end of the day the order is executed to ensure that clearing records identify the ultimate customer for each trade. For uncleared trades, account managers must provide allocation information to the counterparty no later than the end of the calendar day that the swap was executed.

(B) Allocations must be fair and equitable. No account or group of accounts may receive consistently favorable or unfavorable treatment.

(C) The allocation methodology must be sufficiently objective and specific to permit independent verification of the fairness of the allocations using that methodology by appropriate regulatory and self-regulatory authorities and by outside auditors.

(v) *Records.* (A) Eligible account managers shall keep and must make available upon request of any representative of the Commission, the United States Department of Justice, or other appropriate regulatory agency, the information specified in paragraph (b)(5)(iii) of this section.

(B) Eligible account managers shall keep and must make available upon request of any representative of the Commission, the United States Department of Justice, or other appropriate regulatory agency, records sufficient to demonstrate that all allocations meet the standards of paragraph (b)(5)(iv) of this section and to permit the reconstruction of the handling of the order from the time of placement by the account manager to the allocation to individual accounts.

(C) Futures commission merchants, introducing brokers, or commodity trading advisors that execute orders or that carry accounts eligible for post-execution allocation, and members of designated contract markets or swap execution facilities that execute such orders, must maintain records that, as applicable, identify each order subject to post-execution allocation and the accounts to which contracts executed for such order are allocated.

(D) In addition to any other remedies that may be available under the Act or otherwise, if the Commission has reason to believe that an account manager has failed to provide information requested pursuant to paragraph (b)(5)(v)(A) or (b)(5)(v)(B) of this section, the Commission may inform in writing any designated contract market, swap execution facility, swap dealer, or major swap participant, and that designated contract market, swap execution facility, swap dealer, or major swap participant shall prohibit the account manager from submitting orders for execution except for liquidation of open positions and no futures commission merchant shall accept orders for execution on any designated contract market, swap execution facility, or bilaterally from the account manager except for liquidation of open positions.

(E) Any account manager that believes he or she is or may be adversely affected or aggrieved by action taken by the Commission under paragraph (b)(5)(v)(D) of this section shall have the opportunity for a prompt hearing in accordance with the provisions of § 21.03(g) of this chapter.

(c)(1) *Futures commission merchants, introducing brokers, and members of designated contract markets and swap execution facilities.* Upon request of the designated contract market or swap execution facility, the Commission, or the United States Department of Justice, each futures commission merchant, introducing broker, and member of a designated contract market or swap execution facility shall request from its customers and, upon receipt thereof, provide to the requesting body documentation of cash transactions underlying exchanges of futures or swaps for cash commodities or exchanges of futures or swaps in connection with cash commodity transactions.

(2) *Customers.* Each customer of a futures commission merchant, introducing broker, or member of a designated contract market or swap execution facility shall create, retain, and produce upon request of the designated contract market or swap execution facility, the Commission, or the United States Department of Justice documentation of cash transactions underlying exchanges of futures or swaps for cash commodities or exchanges of futures or swaps in connection with cash commodity transactions.

(3) *Contract markets.* Every contract market shall adopt rules which require its members to provide documentation of cash transactions underlying exchanges of futures for cash commodities or exchanges of futures in connection with cash commodity transactions upon request of the contract market.

(4) *Documentation.* For the purposes of this paragraph (c), documentation means those documents customarily generated in accordance with cash market practices which demonstrate the existence and nature of the underlying cash transactions, including, but not limited to, contracts, confirmation statements, telex printouts, invoices, and warehouse receipts or other documents of title.

(d) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* Each futures commission merchant, each retail foreign exchange dealer, and each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility and, for purposes of paragraph (d)(3) of this section, each introducing broker, shall, as a minimum requirement, prepare regularly and promptly, and keep systematically and in permanent form, the following:

(1) A financial ledger record which will show separately for each customer all charges against and credits to such customer's account, including but not limited to customer funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on closed transactions;

(2) A record of transactions which will show separately for each account (including proprietary accounts):

(i) All commodity futures transactions executed for such account, including the date, price, quantity, market, commodity and future;

(ii) All retail forex transactions executed for such account, including the date, price, quantity, and currency;

(iii) All commodity option transactions executed for such account, including the date, whether the transaction involved a put or call, expiration date, quantity, underlying contract for future delivery or underlying commodity, strike price, and details of the purchase price of the option, including premium, mark-up, commission and fees; and

(iv) All swap transactions executed for such account, including the date, price, quantity, market, commodity, swap, and, if cleared, the derivatives clearing organization; and

(3) A record or journal which will separately show for each business day complete details of:

(i) All commodity futures transactions executed on that day, including the date, price, quantity, market, commodity, future and the person for whom such transaction was made;

(ii) All retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person who whom such transaction was made;

(iii) All commodity option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, underlying contract for future delivery or underlying commodity, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

(iv) All swap transactions executed on that day, including the date, price, quantity, market, commodity, swap, the person for whom such transaction was made, and, if cleared, the derivatives clearing organization; and

(v) In the case of an introducing broker, the record or journal required by this paragraph (d)(3) shall also include the futures commission merchant or retail foreign exchange dealer carrying the account for which each commodity futures, retail forex, commodity option, and swap transaction was executed on that day. *Provided, however,* that where reproductions on microfilm, microfiche or optical disk are substituted for hard copy in accordance with the provisions of § 1.31(b), the requirements of paragraphs (d)(1) and (d)(2) of this section will be considered met if the person required to keep such records is ready at all times to provide, and immediately provides in the same city as that in which such person's commodity futures, retail forex, commodity option, or swap books and records are maintained, at the expense of such person, reproduced copies which show the records as specified in paragraphs (d)(1) and (d)(2) of this section, on request of any representatives of the Commission or the U.S. Department of Justice.

(e) *Members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* In the daily record or journal required to be kept under paragraph (d)(3) of this section, each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility shall also show the floor broker or floor trader executing each transaction, the opposite floor broker or floor trader, and the opposite clearing member with whom it was made.

(f) *Members of designated contract markets.* (1) Each member of a designated contract market who, in the place provided by the designated contract market for the meeting of persons similarly engaged, executes purchases or sales of any commodity for future delivery, commodity option, or swap on or subject to the rules of such designated contract market, shall prepare regularly and promptly a trading card or other record showing such purchases and sales. Such trading card or record shall show the member's name, the name of the clearing member, transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, and strike price. Such trading card or other record shall also clearly identify the opposite floor broker or floor trader with whom the transaction was executed, and the opposite clearing member (if such opposite clearing member is made known to the member).

(2) Each member of a designated contract market recording purchases and sales on trading cards must record such purchases and sales in exact chronological order of execution on sequential lines of the trading card without skipping lines between trades; *Provided, however,* That if lines remain after the last execution recorded on a trading card, the remaining lines must be marked through.

(3) Each member of a designated contract market must identify on his or her trading cards the purchases and sales executed during the opening and closing periods designated by the designated contract market.

(4) Trading cards prepared by a member of a designated contract market must contain:

(i) Pre-printed member identification or other unique identifying information which would permit the trading cards of one member to be distinguished from those of all other members;

(ii) Pre-printed sequence numbers to permit the intra-day sequencing of the cards; and

(iii) Unique and pre-printed identifying information which would distinguish each of the trading cards prepared by the member from other such trading cards for no less than a one-week period.

(5) Trading cards prepared by a member of a designated contract market and submitted pursuant to paragraph (f)(7)(i) of this section must be time-stamped promptly to the nearest minute upon collection by either the designated contract market or the relevant clearing member.

(6) Each member of a designated contract market shall be accountable for all trading cards prepared in exact numerical sequence, whether or not such trading cards are relied on as original source documents.

(7) Trading records prepared by a member of a designated contract market must:

(i) Be submitted to designated contract market personnel or the clearing member within 15 minutes of designated intervals not to exceed 30

minutes, commencing with the beginning of each trading session. The time period for submission of trading records after the close of trading in each market shall not exceed 15 minutes from the close. Such documents should nevertheless be submitted as often as is practicable to the designated contract market or relevant clearing member; and

(ii) Be completed in non-erasable ink. A member may correct any errors by crossing out erroneous information without obliterating or otherwise making illegible any of the originally recorded information. With regard to trading cards only, a member may correct erroneous information by rewriting the trading card; *Provided, however,* that the member must submit a ply of the trading card, or in the absence of plies the original trading card, that is subsequently rewritten in accordance with the collection schedule for trading cards and *provided further,* that the member is accountable for any trading card that subsequently is rewritten pursuant to paragraph (f)(6) of this section.

(8) Each member of a designated contract market must use a new trading card at the beginning of each designated 30-minute interval (or such lesser interval as may be determined appropriate) or as may be required pursuant hereto.

(g) *Members of derivatives clearing organizations clearing trades executed on designated contract markets and swap execution facilities.* (1) Each member of a derivatives clearing organization clearing trades executed on a designated contract market or swap execution facility shall maintain a single record which shall show for each futures, option, or swap trade: the transaction date, time, quantity, and, as applicable, underlying commodity, contract for future delivery, or swap, price or premium, delivery month or expiration date, whether the transaction involved a put or a call, strike price, floor broker or floor trader buying, clearing member buying, floor broker or floor trader selling, clearing member selling, and symbols indicating the buying and selling customer types. The customer type indicator shall show, with respect to each person executing the trade, whether such person:

(i) Was trading for his or her own account, or an account for which he or she has discretion;

(ii) Was trading for his or her clearing member's house account;

(iii) Was trading for another member present on the exchange floor, or an account controlled by such other member; or

(iv) Was trading for any other type of customer.

(2) The record required by this paragraph (g) shall also show, by appropriate and uniform symbols, any transaction which is made non-competitively in accordance with the provisions of subpart J of part 38 of this chapter, and trades cleared on dates other than the date of execution. Except as otherwise approved by the Commission for good cause shown, the record required by this paragraph (g) shall be maintained in a format and coding structure approved by the Commission—

(i) In hard copy or on microfilm as specified in § 1.31, and

(ii) For 60 days in computer-readable form on compatible magnetic tapes or discs.

■ 21. Revise § 1.36 to read as follows:

§ 1.36 Record of securities and property received from customers.

(a) Each futures commission merchant and each retail foreign exchange dealer shall maintain, as provided in § 1.31, a record of all securities and property received from customers or retail forex customers in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers or retail forex customers. Such record shall show separately for each customer or retail forex customer: A description of the securities or property received; the name and address of such customer or retail forex customer; the dates when the securities or property were received; the identity of the depositories or other places where such securities or property are segregated or held; the dates of deposits and withdrawals from such depositories; and the dates of return of such securities or property to such customer or retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition. In the event any futures commission merchant deposits with a derivatives clearing organization, directly or with a bank or trust company acting as custodian for such derivatives clearing organization, securities and/or property which belong to a particular customer, such futures commission merchant shall obtain written acknowledgment from such derivatives clearing organization that it was informed that such securities or property belong to customers of the futures commission merchant making the deposit. Such acknowledgment shall be retained as provided in § 1.31.

(b) Each derivatives clearing organization which receives from members securities or property belonging to particular customers of such members in lieu of money to margin, purchase, guarantee, or secure the commodity interests of such customers, or receives notice that any such securities or property have been received by a bank or trust company acting as custodian for such derivatives clearing organization, shall maintain, as provided in § 1.31, a record which will show separately for each member, the dates when such securities or property were received, the identity of the depositories or other places where such securities or property are segregated, the dates such securities or property were returned to the member, or otherwise disposed of, together with the facts and circumstances of such other disposition including the authorization therefor.

■ 22. Revise § 1.37 to read as follows:

§ 1.37 Customer's name, address, and occupation recorded; record of guarantor or controller of account.

(a) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a contract market shall keep a record in permanent form which shall show for each commodity interest account carried or introduced by it the true name and address of the person for whom such account is carried or introduced and the principal occupation or business of such person as well as the name of any other person guaranteeing such account or exercising any trading control with respect to such account. For each such commodity option account, the records kept by such futures commission merchant, introducing broker, and member of a contract market must also show the name of the person who has solicited and is responsible for each customer's account or assign account numbers in such a manner to identify that person.

(b) As of the close of the market each day, each futures commission merchant which carries an account for another futures commission merchant, foreign broker (as defined in § 15.00 of this chapter), member of a contract market, or other person, on an omnibus basis shall maintain a daily record for each such omnibus account of the total open long contracts and the total open short contracts in each future and in each swap and, for commodity option transactions, the total open put options purchased, the total open put options granted, the total open call options purchased, and the total open call options granted for each commodity option expiration date.

(c) Each designated contract market and swap execution facility shall keep a record in permanent form, which shall show the true name, address, and

principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market or swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader.

(d) Paragraph (c) of this section shall not apply to a designated contract market or swap execution facility on which transactions in futures, swaps or options (other than swaps) contracts of foreign traders are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraph (a) of this section.

■ 23. Amend § 1.39 by revising paragraph (a) introductory text and paragraphs (a)(1)(ii), (a)(2), (a)(3), (a)(4), (b), and (c), to read as follows:

§ 1.39 Simultaneous buying and selling orders of different principals; execution of, for and between principals.

(a) *Conditions and requirements.* A member of a contract market or a swap execution facility who shall have at the same time both buying and selling orders of different principals for the same swap, commodity for future delivery in the same delivery month or the same option (both puts or both calls, with the same underlying contract for future delivery or the same underlying commodity, expiration date and strike price) may execute such orders for and directly between such principals at the market price, if in conformity with written rules of such contract market or swap execution facility which have been approved by or self-certified to the Commission, and:

(1) * * *

(ii) When in non-pit trading in swaps or contracts of sale for future delivery, bids and offers are posted on a board, such member:

(A) Pursuant to such buying order posts a bid on the board and, incident to the execution of such selling order, accepts such bid and all other bids posted at equal to or higher than the bid posted by him; or

(B) Pursuant to such selling order posts an offer on the board and, incident to the execution of such buying order, accepts such offer and all other offers posted at prices equal to or lower than the offer posted by him;

(2) Such member executes such orders in the presence of an official representative of such contract market or swap execution facility designated to observe such transactions and, by appropriate descriptive words or symbol, clearly identifies all such transactions on his trading card or other record, made at the time of execution, and notes thereon the exact time of execution and promptly presents or makes available said record to such official representative for verification and initialing, as appropriate;

(3) Such swap execution facility or contract market keeps a record in permanent form of each such transaction showing all transaction details required to be captured by the Act, Commission rule or regulation; and

(4) Neither the futures commission merchant, other registrant receiving nor the member executing such orders has any interest therein, directly or indirectly, except as a fiduciary.

(b) *Large order execution procedures.* (1) A member of a contract market or a swap execution facility may execute simultaneous buying and selling orders of different principals directly between the principals in compliance with Commission regulations and large order execution procedures established by written rules of the contract market or swap execution facility that have been approved by or self-certified to the Commission: *Provided,* That, to the extent such large order execution procedures do not meet the conditions and requirements of paragraph (a) of this section, the contract market or swap execution facility has petitioned the Commission for, and the Commission has granted, an exemption from the conditions and requirements of paragraph (a) of this section. Any such petition must be accompanied by proposed contract market or swap execution facility rules to implement the large order execution procedures. The petition shall include:

(i) An explanation of why the proposed large order execution rules do not comply with paragraph (a) of this section; and

(ii) A description of a special surveillance program that would be followed by the contract market or swap execution facility in monitoring the large order execution procedures.

(2) The Commission may, in its discretion and upon such terms and conditions as it deems appropriate, grant such petition for exemption if it finds that the exemption is not contrary to the public interest and the purpose of the provision from which explanation is sought. The petition shall be considered concurrently with the proposed large order execution rules.

(c) *Not deemed filling orders by offset.* The execution of orders in compliance with the conditions herein set forth will not be deemed to constitute the filling of orders by offset within the meaning of section 4b(a) of the Act.

■ 24. Revise § 1.40 to read as follows:

§ 1.40 Crop, market information letters, reports; copies required.

Each futures commission merchant, each retail foreign exchange dealer, each introducing broker, and each member of a contract market or a swap execution facility shall, upon request, furnish or cause to be furnished to the Commission a true copy of any letter, circular, telecommunication, or report published or given general circulation by such futures commission merchant, retail foreign exchange dealer, introducing broker, member or eligible contract participant which concerns crop or market information or conditions that affect or tend to affect the price of any commodity, including any exchange rate, and the true source of or authority for the information contained therein.

§ 1.44 [Removed and Reserved]

■ 25. Remove and reserve § 1.44.

■ 26. Amend § 1.46 by revising paragraph (a)(1) introductory text and paragraphs (a)(1)(iii), (a)(1)(iv), (a)(2)(iii), (a)(2)(iv), and (b), to read as follows:

§ 1.46 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* (1) Except with respect to purchases or sales which are for omnibus accounts, or where the customer or account controller has instructed otherwise, any futures commission merchant who, on or subject to the rules of a designated contract market:

* * * * *

(iii) Purchases a put or call option for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying futures contract or same underlying commodity, strike price, expiration date and contract market as that purchased; or

(iv) Sells a put or call option for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying futures contract or same underlying commodity, strike price, expiration date and contract market as that sold—shall on the same day apply such purchase or sale against such previously held short or long futures or option position, as the case may be, and shall, for futures transactions, promptly furnish such

customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant by an introducing broker and the names of the futures commission merchant and introducing broker.

(2) * * *

(iii) Purchases a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(iv) Sells a put or call option involving foreign currency for the account of any customer when the account of such customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold—shall immediately apply such purchase or sale against such previously held opposite transaction, and shall promptly furnish such retail forex customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant or retail foreign exchange dealer by an introducing broker and the names of the futures commission merchant or retail foreign exchange dealer, and the introducing broker.

(b) *Close-out against oldest open position.* In all instances wherein the short or long futures, retail forex transaction or option position in such customer's or retail forex customer's account immediately prior to such offsetting purchase or sale is greater than the quantity purchased or sold, the futures commission merchant or retail foreign exchange dealer shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position: *Provided,* That upon specific instructions from the customer the offsetting transaction shall be applied as specified by the customer without regard to the date of acquisition of the previously held position; and *Provided, further,* that a futures commission merchant or retail foreign exchange dealer, if permitted by the rules of a registered futures association, may offset, at the customer's request, retail forex transactions of the same size, even if the customer holds other transactions of a different size, but in each case must offset the transaction against the oldest transaction of the same size. Such instructions may also be accepted from any person who, by power of attorney or otherwise, actually directs trading in the customer's or retail forex customer's account unless the person directing the trading is the futures commission merchant or retail foreign exchange dealer (including any partner thereof), or is an officer, employee, or agent of the futures commission merchant or retail foreign exchange dealer. With respect to every such offsetting transaction that, in accordance with such specific instructions, is not applied to the oldest portion of the previously held position, the futures commission merchant or retail foreign exchange dealer shall clearly show on the statement issued to the customer or retail forex customer in connection with the transaction, that because of the specific instructions given by or on behalf of the customer or retail forex customer the transaction was not applied in the usual manner, *i.e.,* against the oldest portion of the previously held position. However, no such showing need be made if the futures commission merchant or retail foreign exchange dealer has received such specific instructions in writing from the customer or retail forex customer for whom such account is carried.

* * * * *

■ 27. Revise paragraph (b)(1)(iii) of § 1.49 to read as follows:

§ 1.49 Denomination of customer funds and location of depositories.

* * * * *

(b) * * *

(1) * * *

(iii) In a currency in which funds have accrued to the customer as a result of trading conducted on a designated contract market, to the extent of such accruals.

* * * * *

§ 1.53 [Removed and Reserved]

■ 28. Remove and reserve § 1.53.

■ 29. Amend § 1.57 by revising paragraph (a)(1), (a)(2) introductory text, (a)(2)(ii), (c) introductory text, (c)(1), (c)(2), (c)(4)(i), and (c)(4)(iv), to read as follows:

§ 1.57 Operations and activities of introducing brokers.

(a) * * *

(1) Open and carry each customer's account with a carrying futures commission merchant on a fully-disclosed basis: *Provided, however,* That an introducing broker which has entered into a guarantee agreement with a futures commission merchant in accordance with the provisions of § 1.10(j) must open and carry such customer's account with such guarantor futures commission merchant on a fully-disclosed basis; and

(2) Transmit promptly for execution all customer orders to:

* * * * *

(ii) A floor broker, if the introducing broker identifies its carrying futures commission merchant and that carrying futures commission merchant is also the clearing member with respect to the customer's order.

* * * * *

(c) An introducing broker may not accept any money, securities or property (or extend credit in lieu thereof) to margin, guarantee or secure any trades or contracts of customers, or any money, securities or property accruing as a result of such trades or contracts: *Provided, however,* That an introducing broker may deposit a check in a qualifying account or forward a check drawn by a customer if:

(1) The futures commission merchant carrying the customer's account authorizes the introducing broker, in writing, to receive a check in the name of the futures commission merchant, and the introducing broker retains such written authorization in its files in accordance with § 1.31;

(2) The check is payable to the futures commission merchant carrying the customer's account;

* * * * *

(4) * * *

(i) Which is maintained in an account name which clearly identifies the funds therein as belonging to customers of the futures commission merchant carrying the customer's account;

* * * * *

(iv) For which the bank or trust company provides the futures commission merchant carrying the customer's account with a written acknowledgment, which the futures commission merchant must retain in its files in accordance with § 1.31, that it was informed that the funds deposited therein are those of customers and are being held in accordance with the provisions of the Act and the regulations in this chapter.

■ 30. Amend § 1.59 by revising paragraphs (a)(1), (a)(4)(i), (a)(5), (a)(7), (a)(8), (a)(9) introductory text, (a)(10), (b)(1) introductory text, (b)(1)(i)(A), (b)(1)(i)(C), and (c), to read as follows:

§ 1.59 Activities of self-regulatory organization employees, governing board members, committee members and consultants.

(a) * * *

(1) *Self-regulatory organization* means ''self-regulatory organization,'' as defined in § 1.3(ee), and includes the

term ''clearing organization,'' as defined in § 1.3(d).

(4) * * *

(i) Any governing board member compensated by a self-regulatory organization solely for governing board activities; or

* * * * *

(5) *Material information* means information which, if such information were publicly known, would be considered important by a reasonable person in deciding whether to trade a particular commodity interest on a contract market or a swap execution facility, or to clear a swap contract through a derivatives clearing organization. As used in this section, ''material information'' includes, but is not limited to, information relating to present or anticipated cash positions, commodity interests, trading strategies, the financial condition of members of self-regulatory organizations or members of linked exchanges or their customers, or the regulatory actions or proposed regulatory actions of a self-regulatory organization or a linked exchange.

* * * * *

(7) *Linked exchange* means:

(i) Any board of trade, exchange or market outside the United States, its territories or possessions, which has an agreement with a contract market or swap execution facility in the United States that permits positions in a commodity interest which have been established on one of the two markets to be liquidated on the other market;

(ii) Any board of trade, exchange or market outside the United States, its territories or possessions, the products of which are listed on a United States contract market, swap execution facility, or a trading facility thereof;

(iii) Any securities exchange, the products of which are held as margin in a commodity account or cleared by a securities clearing organization pursuant to a cross-margining arrangement with a futures clearing organization; or

(iv) Any clearing organization which clears the products of any of the foregoing markets.

(8) *Commodity interest* means any commodity futures, commodity option or swap contract traded on or subject to the rules of a contract market, a swap execution facility or linked exchange, or cleared by a derivatives clearing organization, or cash commodities traded on or subject to the rules of a board of trade which has been designated as a contract market.

(9) *Related commodity interest* means any commodity interest which is traded on or subject to the rules of a contract market, swap execution facility, linked exchange, or other board of trade, exchange, or market, or cleared by a derivatives clearing organization, other than the self-regulatory organization by which a person is employed, and with respect to which:

* * * * *

(10) *Pooled investment vehicle* means a trading vehicle organized and operated as a commodity pool within the meaning of § 4.10(d) of this chapter, and whose units of participation have been registered under the Securities Act of 1933, or a trading vehicle for which § 4.5 of this chapter makes available relief from regulation as a commodity pool operator, *i.e.,* registered investment companies, insurance company separate accounts, bank trust funds, and certain pension plans.

(b) *Employees of self-regulatory organizations; Self-regulatory organization rules.* (1) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter (or, pursuant to section 17(j) of the Act in the case of a registered futures association) that, at a minimum, prohibit:

(i) * * *

(A) Trading, directly or indirectly, in any commodity interest traded on or cleared by the employing contract market, swap execution facility, or clearing organization;

* * * * *

(C) Trading, directly or indirectly, in a commodity interest traded on contract markets or swap execution facilities or cleared by derivatives clearing organizations other than the employing self-regulatory organization if the employee has access to material, non-public information concerning such commodity interest;

* * * * *

(c) *Governing board members, committee members, and consultants; Registered futures association rules.* Each registered futures association must maintain in effect rules which have been submitted to the Commission pursuant to section 17(j) of the Act which provide that no governing board member, committee member, or consultant shall use or disclose—for any purpose other than the performance of official duties as a governing board member, committee member, or consultant—material, non-public information obtained as a result of the performance of such person's official duties.

* * * * *

§ 1.62 [Removed and Reserved]

■ 31. Remove and reserve § 1.62.

■ 32. Amend § 1.63 by revising paragraphs (a)(1), (b) introductory text and (d) to read as follows:

§ 1.63 Service on self-regulatory organization governing boards or committees by persons with disciplinary histories.

(a) * * *

(1) *Self-regulatory organization* means a ''self-regulatory organization'' as defined in § 1.3(ee), and includes a ''clearing organization'' as defined in § 1.3(d), except as defined in paragraph (b)(6) of this section.

* * * * *

(b) Each self-regulatory organization must maintain in effect rules which have been submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter or, in the case of a registered futures association, pursuant to section 17(j) of the Act, that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels or governing board who:

* * * * *

(d) Each self-regulatory organization shall submit to the Commission a schedule listing all those rule violations which constitute disciplinary offenses as defined in paragraph (a)(6)(i) of this section and to the extent necessary to reflect revisions shall submit an amended schedule within thirty days of the end of each calendar year. Each self-regulatory organization must maintain and keep current the schedule required by this section, and post the schedule on the self-regulatory organization's Web site so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public.

* * * * *

■ 33. Revise § 1.67 to read as follows:

§ 1.67 Notification of final disciplinary action involving financial harm to a customer.

(a) *Definitions.* For purposes of this section:

Final disciplinary action means any decision by or settlement with a contract market or swap execution facility in a disciplinary matter which cannot be further appealed at the contract market or swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction.

(b) Upon any final disciplinary action in which a contract market or swap

execution facility finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer:

(1)(i) The contract market or swap execution facility shall promptly provide written notice of the disciplinary action to the futures commission merchant or other registrant; and

(ii) A futures commission merchant or other registrant that receives a notice, under paragraph (b)(1)(i) of this section shall promptly provide written notice of the disciplinary action to the customer as disclosed on its books and records. If the customer is another futures commission merchant or other registrant, such futures commission merchant or other registrant shall promptly provide notice to the customer.

(2) A written notice required by paragraph (b)(1) of this section must include the principal facts of the disciplinary action and a statement that the contract market or swap execution facility has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer. For the purposes of this paragraph, a notice which includes the information listed in § 9.11(b) of this chapter shall be deemed to include the principal facts of the disciplinary action thereof.

§ 1.68 [Removed and Reserved]

■ 34. Remove and reserve § 1.68.

■ 35. Amend Appendix B to part 1 by revising paragraph (b) to read as follows:

Appendix B—Fees for Contract Market Rule Enforcement Reviews and Financial Reviews

* * * * *

(b) The Commission determines fees charged to exchanges based upon a formula that considers both actual costs and trading volume.

* * * * *

Appendix C to Part 1—[Removed and Reserved]

■ 36. Remove and reserve Appendix C to Part 1.

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

■ 37. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6*l,* 6m, 6n, 6*o,* 12a and 23, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 4.23 [Amended]

■ 38. Amend § 4.23 by removing the term ''physical'' in paragraphs (a)(1) and (b)(1) and adding in its place the term ''commodity''.

§ 4.33 [Amended]

■ 39. Amend § 4.33 by removing the word ''physical'' in paragraph (b)(1) and adding in its place the word ''commodity''.

PART 5—OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS

■ 40. The authority citation for part 5 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6*o,* 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

■ 41. Revise paragraphs (k) and (m) of § 5.1 to read as follows:

§ 5.1 Definitions.

* * * * *

(k) *Retail forex customer* means a person, other than an eligible contract participant as defined in section 1a(18) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.

* * * * *

(m) *Retail forex transaction* means any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act. A retail forex transaction does not include an account, agreement, contract or transaction in foreign currency that is a contract of sale of a commodity for future delivery (or an option thereon) that is executed, traded on or otherwise subject to the rules of a contract market designated pursuant to section 5(a) of the Act.

■ 42. Revise Part 7 to read as follows:

PART 7—REGISTERED ENTITY RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

Authority: 7 U.S.C. 7a–2(c) and 12a(7), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

Subpart A—General Provisions

§ 7.1 Scope of rules.

This part sets forth registered entity rules altered or supplemented by the Commission pursuant to section 8a(7) of the Act.

Subpart B—[Reserved]

Subpart C—[Reserved]

PART 8—[REMOVED AND RESERVED]

■ 43. Remove and reserve part 8.

PART 15—REPORTS—GENERAL PROVISIONS

■ 44. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 45. Revise paragraph (p)(1)(ii) of § 15.00 to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

* * * * *

(p) * * *

(1) * * *

(ii) Long or short put or call options that exercise into the same future of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market.

* * * * *

■ 46. Revise paragraphs (a), (e), (f), (g) and (h) of § 15.05 to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term ''futures contract'' means any contract for the purchase or sale of any commodity for future delivery, or a contract identified under § 36.3(c)(1)(i) traded on an electronic trading facility operating in reliance on the exemption set forth in § 36.3 of this chapter, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term ''option contract'' means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act, traded or executed on or subject to the rules of any designated contract market, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term

''customer'' means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term ''communication'' means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

* * * * *

(e) Any designated contract market that permits a foreign broker to intermediate contracts, agreements or transactions, or permits a foreign trader to effect contracts, agreements or transactions on the facility or exchange, shall be deemed to be the agent of the foreign broker and any of its customers for whom the transactions were executed, or the foreign trader, for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader with respect to any contracts, agreements or transactions executed by the foreign broker or the foreign trader on the designated contract market. Service or delivery of any communication issued by or on behalf of the Commission to a designated contract market shall constitute valid and effective service upon the foreign broker, any of its customers, or the foreign trader. A designated contract market which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, any of its customers, or a foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, any of its customers or the foreign trader.

(f) It shall be unlawful for any designated contract market to permit a foreign broker, any of its customers or a foreign trader to effect contracts, agreements or transactions on the facility unless the designated contract market prior thereto informs the foreign broker, any of its customers or the foreign trader, in any reasonable manner the facility deems to be appropriate, of the requirements of this section.

(g) The requirements of paragraphs (e) and (f) of this section shall not apply to any contracts, transactions or agreements traded on any designated contract market if the foreign broker, any of its customers or the foreign trader has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the designated contract market prior to effecting any contract, agreement or transaction on the facility. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign broker, any of its customers or the foreign trader for purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the foreign broker, any of its customers or the foreign trader and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the designated contract market prior to permitting the foreign broker, any of its customers or the foreign trader to effect any transactions in futures or option contracts. Unless otherwise specified by the Commission, the agreements required to be filed with the Commission shall be filed with the Secretary of the Commission at Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. A foreign broker, any of its customers or a foreign trader shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the designated contract market knows or should know that the agreement has expired, been terminated, or is no longer in effect, the designated contract market shall notify the Secretary of the Commission immediately. If the written agency agreement expires, terminates, or is not in effect, the designated contract market and the foreign broker, any of its customers or the foreign trader are subject to the provisions of paragraphs (e) and (f) of this section.

(h) The provisions of paragraphs (e), (f) and (g) of this section shall not apply to a designated contract market on which all transactions of foreign brokers, their customers or foreign traders in futures or option contracts are executed through, or the resulting transactions are maintained in, accounts carried by a registered futures commission merchant or introduced by a registered introducing broker subject to the provisions of paragraphs (a), (b), (c) and (d) of this section.

* * * * *

PART 16—REPORTS BY REPORTING MARKETS

■ 47. The authority citation for part 16 continues to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

■ 48. Revise paragraph (a) introductory text of § 16.00 to read as follows:

§ 16.00 Clearing member reports.

(a) *Information to be provided.* Each reporting market shall submit to the Commission, in accordance with paragraph (b) of this section, a report for each business day, showing for each clearing member, by proprietary and customer account, the following information separately for futures by commodity and by future, and, for options, by underlying futures contract (for options on futures contracts) or by underlying commodity (for other commodity options), and by put, by call, by expiration date and by strike price:

* * * * *

■ 49. Amend § 16.01 by revising the section heading and paragraphs (a)(1)(ii), (a)(1)(iv), (b)(1)(ii), and (b)(1)(iv) to read as follows:

§ 16.01 Publication of market data on futures, swaps and options thereon: trading volume, open contracts, prices, and critical dates.

(a) * * *

(1) * * *

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying commodity for options on commodities, and by put, by call, by expiration date and by strike price;

* * * * *

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying commodity for options on swaps on commodities, and by put, by call, by expiration date and by strike price.

* * * * *

(b) * * *

(1) * * *

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying commodity for options on commodities, and by put, by call, by expiration date and by strike price;

* * * * *

(iv) For options on swaps or classes of options on swaps, by underlying swap contracts for options on swap contracts or by underlying commodity for options on swaps on commodities, and by put, by call, by expiration date and by strike price.

* * * * *

PART 18—REPORTS BY TRADERS

■ 50. The authority citation for part 18 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 51. Revise paragraphs (a)(2), (a)(3), and (a)(4) of § 18.05 to read as follows:

§ 18.05 Maintenance of books and records.

(a) * * *

(2) Executed over the counter or pursuant to part 35 of this chapter;

(3) On exempt commercial markets operating under a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010));

(4) On exempt boards of trade operating under a Commission grandfather relief order issued pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)); and

* * * * *

PART 21—SPECIAL CALLS

■ 52. The authority citation for part 21 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by Pub. L. 111–203, 124 Stat. 1376; 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 53. Revise paragraph (b) of § 21.03 to read as follows:

§ 21.03 Selected special calls—duties of foreign brokers, domestic and foreign traders, futures commission merchants, clearing members, introducing brokers, and reporting markets.

* * * * *

(b) It shall be unlawful for a futures commission merchant to open a futures or options account or to effect transactions in futures or options contracts for an existing account, or for an introducing broker to introduce such an account, for any customer for whom the futures commission merchant or introducing broker is required to provide the explanation provided for in § 15.05(c) of this chapter, or for a reporting market that is a registered entity under section 1a(40)(F) of the Act, to cause to open an account, or to cause transactions to be effected, in a contract traded in reliance on a Commission grandfather relief order issued pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), for an existing account for any person that is a foreign clearing member or foreign trader, until the futures commission merchant, introducing broker, clearing member or reporting market has explained fully to the customer, in any manner that such person deems appropriate, the provisions of this section.

* * * * *

PART 22—CLEARED SWAPS

■ 54. The authority citation for part 22 continues to read as follows:

Authority: 7 U.S.C. 1a, 6d, 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

§ 22.1 [Amended]

■ 55. Amend § 22.1 by removing the definition of ''Customer.''

■ 56. Amend § 22.2 by revising paragraphs (c)(2)(ii) and (e)(1) to read as follows:

§ 22.2 Futures Commission Merchants: Treatment of Cleared Swaps and Associated Cleared Swaps Customer Collateral.

* * * * *

(c) * * *

(2) * * *

(ii) Other categories of funds belonging to Futures Customers (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as § 30.1 of this chapter defines that term) of the futures commission merchant, including Futures Customer Funds (as § 1.3 of this chapter defines such term) or the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter.

* * * * *

(e) * * *

(1) *Permitted investments.* A futures commission merchant may invest money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter.

* * * * *

■ 57. Amend § 22.3 by revising paragraphs (c)(2)(iii) and (d) to read as follows:

§ 22.3 Derivatives clearing organizations: Treatment of cleared swaps customer collateral.

* * * * *

(c) * * *

(2) * * *

(iii) Futures Customer Funds (as § 1.3 of this chapter defines such term) or the foreign futures or foreign options secured amount (as § 1.3 of this chapter defines such term), except as expressly permitted by Commission rule, regulation, or order, (or by a derivatives clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter).

(d) *Exceptions; Permitted Investments.* Notwithstanding the foregoing and § 22.15, a derivatives clearing organization may invest the money, securities, or other property constituting Cleared Swaps Customer Collateral in accordance with § 1.25 of this chapter.

■ 58. Amend § 22.5 by revising paragraphs (a) and (b) to read as follows:

§ 22.5 Futures commission merchants and derivatives clearing organizations: Written acknowledgement.

(a) Before depositing Cleared Swaps Customer Collateral, the futures commission merchant or derivatives clearing organization shall obtain and retain in its files a separate written acknowledgement letter from each depository in accordance with §§ 1.20 and 1.26 of this chapter, with all references to ''Futures Customer Funds'' modified to apply to Cleared Swaps Customer Collateral, and with all references to section 4d(a) or 4d(b) of the Act and the regulations thereunder modified to apply to section 4d(f) of the Act and the regulations thereunder.

(b) The futures commission merchant or derivatives clearing organization shall adhere to all requirements specified in §§ 1.20 and 1.26 of this chapter regarding retaining, permitting access to, filing, or amending the written acknowledgement letter, in all cases as if the Cleared Swaps Customer Collateral comprised Futures Customer Funds subject to segregation pursuant to section 4d(a) or 4d(b) of the Act and the regulations thereunder.

* * * * *

■ 59. Amend § 22.9 by revising paragraphs (a) and (b) to read as follows:

§ 22.9 Denomination of Cleared Swaps Customer Collateral and location of depositories.

(a) Subject to paragraph (b) of this section, futures commission merchants and derivatives clearing organizations may hold Cleared Swaps Customer Collateral in the denominations, at the locations and depositories, and subject to the segregation requirements specified in § 1.49 of this chapter.

(b) Notwithstanding the requirements in § 1.49 of this chapter, a futures commission merchant's obligations to a Cleared Swaps Customer may be denominated in a currency in which funds have accrued to the Cleared

Swaps Customer as a result of a Cleared Swap carried through such futures commission merchant, to the extent of such accruals.

* * * * *

■ 60. Revise § 22.10 to read as follows:

§ 22.10 Application of other regulatory provisions.

Sections 1.27, 1.28, 1.29, and 1.30 of this chapter shall apply to the Cleared Swaps Customer Collateral in accordance with the terms therein.

■ 61. Amend § 22.11 by revising the section heading and paragraphs (a)(1), (a)(2), (b)(2), (c)(1), (c)(2), and (d)(2), to read as follows:

§ 22.11 Information to be provided regarding Cleared Swaps Customers and their Cleared Swaps.

(a) * * *

(1) The first time that the Depositing Futures Commission Merchant intermediates a Cleared Swap for a Cleared Swaps Customer with a Collecting Futures Commission Merchant, provide information sufficient to identify such Cleared Swaps Customer to the relevant Collection Futures Commission Merchant; and

(2) At least once each business day thereafter, provide information to the relevant Collecting Futures Commission Merchant sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that the Depositing Futures Commission Merchant intermediates for such Cleared Swaps Customer.

(b) * * *

(2) The information that such entity must provide to its Collecting Futures Commission Merchant pursuant to paragraph (a)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (b)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that such entity intermediates as a Collecting Futures Commission Merchant, on behalf of its Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

(c) * * *

(1) The first time that such futures commission merchant intermediates a Cleared Swap for a Cleared Swaps Customer, provide information to the relevant derivatives clearing organization sufficient to identify such Cleared Swaps Customer; and

(2) At least once each business day thereafter, provide information to the relevant derivatives clearing organization sufficient to identify, for each Cleared Swaps Customer, the portfolio of rights and obligations arising from the Cleared Swaps that such futures commission merchant intermediates for such Cleared Swaps Customer.

(d) * * *

(2) The information that it must provide to the derivatives clearing organization pursuant to paragraph (c)(2) of this section shall also include information sufficient to identify, for each Cleared Swaps Customer referenced in paragraph (d)(1) of this section, the portfolio of rights and obligations arising from the Cleared Swaps that the Collecting Futures Commission Merchant intermediates, on behalf of the Depositing Futures Commission Merchant, for such Cleared Swaps Customer.

* * * * *

■ 62. Amend § 22.12 by revising paragraph (a) introductory text and paragraph (c) introductory text to read as follows:

§ 22.12 Information to be maintained regarding Cleared Swaps Customer Collateral.

(a) Each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from an entity serving as a Depositing Futures Commission Merchant shall, no less frequently than once each business day, calculate and record:

* * * * *

(c) Each derivatives clearing organization receiving Cleared Swaps Customer Collateral from a futures commission merchant shall, no less frequently than once each business day, calculate and record:

* * * * *

■ 63. Amend § 22.13 by revising paragraph (a) to read as follows:

§ 22.13 Additions to Cleared Swaps Customer Collateral.

(a)(1) At the election of the derivatives clearing organization or Collecting Futures Commission Merchant, the collateral requirement referred to in § 22.12(a), (c), and (d) applicable to a particular Cleared Swaps Customer or group of Cleared Swaps Customers may be increased based on an evaluation of the credit risk posed by such Cleared Swaps Customer or group, in which case the derivatives clearing organization or Collecting Futures Commission Merchant shall collect and record such higher amount as provided in § 22.12.

(2) Nothing in paragraph (a)(1) of this section is intended to interfere with the right of a futures commission merchant to increase the collateral requirements at such futures commission merchant with respect to any of its Cleared Swaps Customers, Futures Customers (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customers (as § 30.1 of this chapter defines that term).

* * * * *

■ 64. Amend § 22.14 by revising the section heading and paragraphs (a)(2) and (c)(2) to read as follows:

§ 22.14 Futures Commission Merchant failure to meet a Cleared Swaps Customer Margin Call in full.

(a) * * *

(2) Advise the Collecting Futures Commission Merchant of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such Cleared Swaps Customer.

* * * * *

(c) * * *

(2) Advise the derivatives clearing organization of the identity of each such Cleared Swaps Customer, and the amount transmitted on behalf of each such Cleared Swaps Customer.

* * * * *

■ 65. Section 22.15 is revised to read as follows:

§ 22.15 Treatment of Cleared Swaps Customer Collateral on an individual basis.

Subject to § 22.3(d), each derivatives clearing organization and each Collecting Futures Commission Merchant receiving Cleared Swaps Customer Collateral from a futures commission merchant shall treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the Cleared Swaps intermediated for each Cleared Swaps Customer, and collected from the futures commission merchant, as belonging to such Cleared Swaps Customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the futures commission merchant, or of any other Cleared Swaps Customer, Futures Customer (as § 1.3 of this chapter defines that term), or Foreign Futures or Foreign Options Customer (as § 30.1 of this chapter defines that term). Nothing contained herein shall be construed to limit, in any way, the right of a derivatives clearing organization or Collecting Futures Commission Merchant to liquidate any or all positions in a Cleared Swaps Customer Account in the event of a default of a clearing member or Depositing Futures Commission Merchant.

■ 66. Amend § 22.16 by revising the section heading to read as follows:

§ 22.16 Disclosures to Cleared Swaps Customers.

* * * * *

PART 36—EXEMPT MARKETS

■ 67. The authority citation for part 36 continues to read as follows:

Authority: 7 U.S.C. 2, 2(h)(7), 6, 6c and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008).

■ 68. Section 36.1 is revised to read as follows:

§ 36.1 Scope.

The provisions of this part apply to any board of trade or electronic trading facility that operates as:

(a) An exempt commercial market operating under:

(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 723(c)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or

(2) Any other applicable relief granted by the Commission; or

(b) An exempt board of trade operating under:

(1) Until July 16, 2012, a grandfather relief order issued by the Commission pursuant to Section 734(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)), or

(2) Any other applicable relief granted by the Commission.

■ 69. Amend § 36.2 by:

■ a. Revising paragraph (a) introductory text and (a)(2)(i);

■ b. Adding paragraph (a)(3); and

■ c. Revising paragraph (b) introductory text, (c)(1), (c)(2)(i) introductory text, (c)(2)(ii) introductory text, (c)(2)(iii), (c)(2)(iv)(A) introductory text, and (c)(3), to read as follows:

§ 36.2 Exempt boards of trade.

(a) *Eligible commodities.* Commodities eligible to be traded by an exempt board of trade are:

* * * * *

(2) * * *

(i) The commodities defined in section 1a(19) of the Act as ''excluded commodities'' (other than a security, including any group or index thereof or any interest in, or based on the value of, any security or group or index of securities); and

* * * * *

(3) Such contracts must be entered into only between persons that are eligible contract participants, as defined in section 1a(18) of the Act and as further defined by the Commission, at the time at which the persons entered into the contract.

(b) *Notification.* Boards of trade operating as exempt boards of trade shall maintain on file with the Secretary of the Commission at the Commission's Washington, DC headquarters, in electronic form, a ''Notification of Operation as an Exempt Board of Trade,'' and it shall include:

* * * * *

(c) *Additional requirements*—(1) *Prohibited representation.* A board of trade that meets the criteria set forth in this section and operates as an exempt board of trade shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* An exempt board of trade performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the facility when:

* * * * *

(ii) *Notification.* An exempt board of trade operating a market in reliance on the criteria set forth in this section shall notify the Commission when:

* * * * *

(iii) *Price discovery determination.* Following receipt of notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an exempt board of trade that the facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the exempt board of trade with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* (A) An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly, and on a daily basis, all of the following information with respect to transactions executed in reliance on the criteria set forth in this section:

* * * * *

(3) *Annual certification.* A board of trade operating as an exempt board of trade shall file with the Commission annually, no later than the end of each calendar year, a notice that includes:

(i) A statement that it continues to operate under the exemption; and

(ii) A certification that the information contained in the previous Notification of Operation as an Exempt Board of Trade is still correct.

■ 70. Section 36.3 is revised to read as follows:

§ 36.3 Exempt commercial markets.

(a) *Eligible transactions.* Agreements, contracts or transactions in an exempt commodity eligible to be entered into on an exempt commercial market must be:

(1) Entered into on a principal-to-principal basis solely between persons that are eligible commercial entities, as that term is defined in section 1a(17) of the Act, at the time the persons enter into the agreement, contract or transaction; and

(2) Executed or traded on an electronic trading facility.

(b) *Notification.* An electronic trading facility relying upon the exemption set forth in this section shall maintain on file with the Secretary of the Commission at the Commission's Washington, DC headquarters, in electronic form, a ''Notification of Operation as an Exempt Commercial Market,'' and it shall include the information and certifications specified in this section.

(c) *Required information*—(1) *All electronic trading facilities.* A facility operating in reliance on the exemption set forth in this section on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in § 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in this section, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of ''trading facility'' contained in section 1a(51) of the Act and provide the Commission with access to the electronic trading facility's trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant

agrees to comply with all applicable laws; that the authorized participants are ''eligible commercial entities'' as defined in section 1a(17) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants' compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, a facility operating in reliance on the exemption set forth in this section, with respect to agreements, contracts or transactions that have not been determined to perform significant price discovery function, on an on-going basis must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption set forth in this section, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies, and shall show for each agreement, contract or transaction executed the following information:

(*1*) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(*2*) Total daily volume and, if cleared, open interest;

(*3*) For an option instrument, in addition to the foregoing information, the type of option (*i.e.,* call or put) and strike prices; and

(*4*) Such other information as the Commission may determine; or

(B) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption set forth in this section, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information set forth in paragraph (c)(2)(i)(A) of this section and create a permanent record thereof.

(ii) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in this section. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(iii) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (c)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received; *Provided, however,* that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission rules, such copy shall be provided to the Commission within three business days after the complaint is received; and

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in this section and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract's average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption set forth in this section trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by § 16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (c)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(4).

(5) *Special calls.* (i) All information required upon special call of the Commission shall be transmitted at the same time and to the office of the Commission as may be specified in the call.

(ii) Such information shall include information related to the facility's business as an exempt electronic trading facility in reliance on the exemption set forth in this section, including information relating to data entry and transaction details in respect of transactions entered into in reliance on the exemption, as the Commission may determine appropriate—

(A) To enforce the antifraud and anti-manipulation provisions in the Act and Commission regulations, and

(B) To evaluate a systemic market event; or

(C) To obtain information requested by a Federal financial regulatory authority in order to enable the regulator to fulfill its regulatory or supervisory responsibilities.

(iii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls to the Directors of the Division of Market Oversight, the Division of Clearing and Risk, the Division of Swap Dealer and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as

the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(5).

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption set forth in this section, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(d) *Significant price discovery contracts*—(1) *Criteria for significant price discovery determination.* The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption set forth in this section performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *Price linkage.* The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position;

(ii) *Arbitrage.* The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis;

(iii) *Material price reference.* The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity.* The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market or an electronic trading facility operating in reliance on the exemption set forth in this section;

(v) *Other material factors.* [Reserved]

(2) *Notification of possible significant price discovery contract conditions.* An electronic trading facility operating in reliance on the exemption set forth in this section shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii)(A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) Whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another agreement, contract or transaction.

(3) *Procedure for significant price discovery determination.* Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the **Federal Register** that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Any such written data, views and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register** or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission shall, within a reasonable period of time after the close of the comment period, issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria specified in paragraph (d)(1)(i) through (v) of this section.

(4) *Compliance with core principles.* (i) Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles set forth in this section and the applicable provisions of this part. If the Commission's order represents the first time it has determined that one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of the Commission's order. Attention is directed to Appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(A) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(B) A copy of the electronic trading facility's rules (as defined in § 40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section 5c(c) of the Act and § 40.6 of this chapter. The electronic trading facility also may request Commission approval of any

rule changes pursuant to section 5c(c) of the Act and § 40.5 of this chapter;

(C) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(D) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(E) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(F) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(G) To the extent that any of the items in paragraphs (d)(4)(i)(A) through (F) of this section raise issues that are novel, or for which compliance with a Core Principle is not self-evident, an explanation of how that item satisfies the applicable Core Principle or Principles.

(ii) The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to § 145.09 of this chapter. The electronic trading facility must follow the procedures specified in § 40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles.* The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the Core Principles by an electronic trading facility. The electronic facility has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more Core Principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions set forth in this section; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function*—(i) *By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (d)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a significant price discovery function under the criteria specified in paragraph (d)(1), and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months for any individual contract.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the **Federal Register** that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register**, or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 30 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.* Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

(e) *Commission review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption set forth in this section to determine whether they serve a significant price discovery function as set forth in paragraph (d)(1) of this section.

■ 71. Amend Appendix A to part 36 by revising introductory paragraph 1, the headings to paragraphs (A), (B), and (C), and paragraphs (D)2. and (D)4., to read as follows:

Appendix A to Part 36—Guidance on Specific Price Discovery Contracts

1. There are four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

* * * * *

(A) MATERIAL LIQUIDITY—The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated

contract market, or an electronic trading facility operating in reliance on the exemption set forth in this section.

* * * * *

(B) PRICE LINKAGE—The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.

* * * * *

(C) ARBITRAGE CONTRACTS—The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

* * * * *

(D) * * *

2. In evaluating a contract's price discovery role as a directly referenced price source, the Commission will perform an analysis to determine whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract. Cash market prices are set explicitly at a differential to the contract being traded on the electronic trading facility when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a contract being traded on the electronic trading facility when, for instance, they are arrived at after adding to, or subtracting from the contract being traded on the electronic trading facility, but then quoted or reported at a flat price. The Commission will also consider whether cash market entities are quoting cash prices based on a contract being traded on the electronic trading facility on a frequent and recurring basis.

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4. In applying this criterion, consideration will be given to whether prices established by a contract being traded on the electronic trading facility are reported in a widely distributed industry publication. In making this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

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■ 72. Revise Appendix B to part 36 to read as follows:

Appendix B to Part 36—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This Appendix provides guidance on complying with the core principles set forth in this part, both initially and on an ongoing basis. The guidance is provided in paragraph (a) following each core principle and can be used to demonstrate to the Commission core principle compliance under § 36.3(d)(4). The guidance for each core principle is illustrative only of the types of matters an electronic trading facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues and questions set forth in this guidance will help the Commission in its consideration of whether the electronic trading facility is in compliance with the core principles. A submission pursuant to § 36.3(d)(4) should include an explanation or other form of documentation demonstrating that the electronic trading facility complies with the core principles.

2. Acceptable practices meeting selected requirements of the core principles are set forth in paragraph (b) following each core principle. Electronic trading facilities on which significant price discovery contracts are traded or executed that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE I—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION. The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.

(a) *Guidance.* Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under § 36.3(d)(4) within 90 calendar days of the date of the Commission's order if the contract is the electronic trading facility's first significant price discovery contract; or 30 days from the date of the Commission's order if the contract is not the electronic trading facility's first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to the Commission by the electronic trading facility pursuant to § 40.6 of this chapter or submitted to the Commission for review and approval pursuant to § 40.5 of this chapter.

(b) *Acceptable practices.* Guideline No. 1, 17 CFR part 40, Appendix A may be used as guidance in meeting this core principle for significant price discovery contracts.

CORE PRINCIPLE II—MONITORING OF TRADING. The electronic trading facility shall monitor trading in significant price discovery contracts to prevent market manipulation, price distortion, and disruptions of the delivery of cash-settlement process through market surveillance, compliance and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, demonstrate a capacity to prevent market manipulation and have trading and participation rules to detect and deter abuses. The facility should seek to prevent market manipulation and other trading abuses through a dedicated regulatory department or by delegation of that function to an appropriate third party. An electronic trading facility also should have the authority to intervene as necessary to maintain an orderly market.

(b) *Acceptable practices*—(1) *An acceptable trade monitoring program.* An acceptable trade monitoring program should facilitate, on both a routine and non-routine basis, arrangements and resources to detect and deter abuses through direct surveillance of each significant price discovery contract. Direct surveillance of each significant price discovery contract will generally involve the collection of various market data, including information on participants' market activity. Those data should be evaluated on an ongoing basis in order to make an appropriate regulatory response to potential market disruptions or abusive practices. For contracts with a substantial number of participants, an effective surveillance program should employ a much more comprehensive large trader reporting system.

(2) *Authority to collect information and documents.* The electronic trading facility should have the authority to collect information and documents in order to reconstruct trading for appropriate market analysis. Appropriate market analysis should enable the electronic trading facility to assess whether each significant price discovery contract is responding to the forces of supply and demand. Appropriate data usually include various fundamental data about the underlying commodity, its supply, its demand, and its movement through market channels. Especially important are data related to the size and ownership of deliverable supplies—the existing supply and the future or potential supply—and to the pricing of the deliverable commodity relative to the futures price and relative to the similar, but non-deliverable, kinds of the commodity. For cash-settled contracts, it is more appropriate to pay attention to the availability and pricing of the commodity making up the index to which the contract will be settled, as well as monitoring the continued suitability of the methodology for deriving the index.

(3) *Ability to assess participants' market activity and power.* To assess participants' activity and potential power in a market, electronic trading facilities, with respect to significant price discovery contracts, at a minimum should have routine access to the positions and trading of its participants and, if applicable, should provide for such access through its agreements with its third-party provider of clearing services.

CORE PRINCIPLE III—ABILITY TO OBTAIN INFORMATION. The electronic trading facility shall establish and enforce rules that allow the electronic trading facility to obtain any necessary information to perform any of the functions set forth in this subparagraph, provide the information to the Commission upon request, and have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, have the ability and authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by participants. This includes having arrangements and resources for recording full data entry and trade details and safely storing audit trail data. An electronic trading facility should have systems sufficient to enable it to use the information for purposes of assisting in the prevention of participant and market abuses through reconstruction of trading and providing evidence of any violations of the electronic trading facility's rules.

(b) *Acceptable practices*—(1) The goal of an audit trail is to detect and deter market abuse. An effective contract audit trail should capture and retain sufficient trade-related information to permit electronic trading facility staff to detect trading abuses and to reconstruct all transactions within a reasonable period of time. An audit trail should include specialized electronic surveillance programs that identify potentially abusive trades and trade patterns. An acceptable audit trail must be able to track an order from time of entry into the trading system through its fill. The electronic trading facility must create and maintain an electronic transaction history database that contains information with respect to transactions executed on each significant price discovery contract.

(2) An acceptable audit trail should include the following: original source documents, transaction history, electronic analysis capability, and safe storage capability. An acceptable audit trail system would satisfy the following practices.

(i) *Original source documents.* Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded. For each order (whether filled, unfilled or cancelled, each of which should be retained or electronically captured), such records reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry.

(ii) *Transaction history.* A transaction history consists of an electronic history of each transaction, including:

(A) All the data that are input into the trade entry or matching system for the transaction to match and clear;

(B) Timing and sequencing data adequate to reconstruct trading; and

(C) The identification of each account to which fills are allocated.

(iii) *Electronic analysis capability.* An electronic analysis capability permits sorting and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) *Safe storage capability.* Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of § 1.31 of this chapter.

(3) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. The electronic trading facility should maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of § 1.31 of this chapter.

(4) The capacity to carry out appropriate information-sharing agreements as the Commission may require. Appropriate information-sharing agreements could be established with other markets or the Commission can act in conjunction with the electronic trading facility to carry out such information sharing.

CORE PRINCIPLE IV—POSITION LIMITATIONS OR ACCOUNTABILITY. The electronic trading facility shall adopt, where necessary and appropriate, position limitations or position accountability for speculators in significant price discovery contracts, taking into account positions in other agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contracts to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.

(a) *Guidance.* [Reserved]

(b) *Acceptable practices for uncleared trades.* [Reserved]

(c) *Acceptable practices for cleared trades*—(1) *Introduction.* In order to diminish potential problems arising from excessively large speculative positions, and to facilitate orderly liquidation of expiring contracts, an electronic trading facility relying on the exemption set forth in this section should adopt rules that set position limits or accountability levels on traders' cleared positions in significant price discovery contracts. These position limit rules specifically may exempt bona fide hedging; permit other exemptions; or set limits differently by market, delivery month or time period. For the purpose of evaluating a significant price discovery contract's speculative-limit program for cleared positions, the Commission will consider the specified position limits or accountability levels, aggregation policies, types of exemptions allowed, methods for monitoring compliance with the specified limits or levels, and procedures for dealing with violations.

(2) *Accounting for cleared trades*—(i) Speculative-limit levels typically should be set in terms of a trader's combined position involving cleared trades in a significant price discovery contract, plus positions in agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contract. (This circumstance typically exists where an exempt commercial market lists a particular contract for trading but also allows for positions in that contract to be cleared together with positions established through bilateral or off-exchange transactions, such as block trades, in the same contract. Essentially, both the on-facility and off-facility transactions are considered fungible with each other.) In this connection, the electronic trading facility should make arrangements to ensure that it is able to ascertain accurate position data for the market.

(ii) For significant price discovery contracts that are traded on a cleared basis, the electronic trading facility should apply position limits to cleared transactions in the contract.

(3) *Limitations on spot-month positions.* Spot-month limits should be adopted for significant price discovery contracts to minimize the susceptibility of the market to manipulation or price distortions, including squeezes and corners or other abusive trading practices.

(i) *Contracts economically equivalent to an existing contract.* An electronic trading facility that lists a significant price discovery contract that is economically-equivalent to another significant price discovery contract or to a contract traded on a designated contract market should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(ii) *Contracts that are not economically equivalent to an existing contract.* There may not be an economically-equivalent significant price discovery contract or economically-equivalent contract traded on a designated contract market. In this case, the spot-month speculative position limit should be established in the following manner. The spot-month limit for a physical delivery market should be based upon an analysis of deliverable supplies and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply. In the case where a significant price discovery contract has a cash settlement provision, the spot-month limit should be set at a level that minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a designated contract market; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity.

(4) *Position accountability for non-spot-month positions.* The electronic trading facility should establish for its significant price discovery contracts non-spot individual

month position accountability levels and all-months-combined position accountability levels. An electronic trading facility may establish non-spot individual month position limits and all-months-combined position limits for its significant price discovery contracts in lieu of position accountability levels.

(i) *Definition.* Position accountability provisions provide a means for an exchange to monitor traders' positions that may threaten orderly trading. An acceptable accountability provision sets target accountability threshold levels that may be exceeded, but once a trader breaches such accountability levels, the electronic trading facility should initiate an inquiry to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the electronic trading facility may inquire about the trader's rationale for holding a position in excess of the accountability levels. An acceptable accountability provision should provide the electronic trading facility with the authority to order the trader not to further increase positions. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the facility, then the accountability provision should enable the electronic trading facility to require the trader to reduce positions.

(ii) *Contracts economically equivalent to an existing contract.* When an electronic trading facility lists a significant price discovery contract that is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market, the electronic trading facility should set the non-spot individual month position accountability level and all-months-combined position accountability level for its significant price discovery contract at the same levels, or lower, as those specified for the economically-equivalent contract.

(iii) *Contracts that are not economically equivalent to an existing contract.* For significant price discovery contracts that are not economically equivalent to an existing contract, the trading facility shall adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year. For electronic trading facilities that choose to adopt non-spot individual month and all-months-combined position limits in lieu of position accountability levels for their significant price discovery contracts, the limits should be set in the same manner as the accountability levels.

(iv) *Contracts economically equivalent to an existing contract with position limits.* If a significant price discovery contract is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market that has adopted non-spot or all-months-combined position limits, the electronic trading facility should set non-spot month position limits and all-months-combined position limits for its significant price discovery contract at the same (or lower) levels as those specified for the economically-equivalent contract.

(5) *Account aggregation.* An electronic trading facility should have aggregation rules for significant price discovery contracts that apply to accounts under common control, those with common ownership, *i.e.,* where there is a ten percent or greater financial interest, and those traded according to an express or implied agreement. Such aggregation rules should apply to cleared transactions with respect to applicable speculative position limits. An electronic trading facility will be permitted to set more stringent aggregation policies. An electronic trading facility may grant exemptions to its price discovery contracts' position limits for bona fide hedging (as defined in § 1.3(z) of this chapter) and may grant exemptions for reduced risk positions, such as spreads, straddles and arbitrage positions.

(6) *Implementation deadlines.* An electronic trading facility with a significant price discovery contract is required to comply with Core Principle IV within 90 calendar days of the date of the Commission's order determining that the contract performs a significant price discovery function if such contract is the electronic trading facility's first significant price discovery contract, or within 30 days of the date of the Commission's order if such contract is not the electronic trading facility's first significant price discovery contract. For the purpose of applying limits on speculative positions in newly-determined significant price discovery contracts, the Commission will permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the electronic trading facility's significant price discovery contract must be at or below the specified position limit level no later than 90 calendar days from the date of the electronic trading facility's implementation of position limit rules, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent price discovery contracts. Electronic trading facilities should notify traders of this requirement promptly upon implementation of such rules.

(7) *Enforcement provisions.* The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(i) An electronic trading facility with significant price discovery contracts should use an automated means of detecting traders' violations of speculative limits or exemptions, particularly if the significant price discovery contracts have large numbers of traders. An electronic trading facility should monitor the continuing appropriateness of approved exemptions by periodically reviewing each trader's basis for exemption or requiring a reapplication. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month position accountability levels and all-months-combined position accountability levels.

(ii) An electronic trading facility should establish a program for effective enforcement of position limits for significant price discovery contracts. Electronic trading facilities should use a large trader reporting system to monitor and enforce daily compliance with position limit rules. The Commission notes that an electronic trading facility may allow traders to periodically apply to the electronic trading facility for an exemption and, if appropriate, be granted a position level higher than the applicable speculative limit. The electronic trading facility should establish a program to monitor approved exemptions from the limits. The position levels granted under such hedge exemptions generally should be based upon the trader's commercial activity in related markets including, but not limited to, positions held in related futures and options contracts listed for trading on designated contract markets, fungible agreements, contracts and transactions, as determined by a derivatives clearing organization. Electronic trading facilities may allow a brief grace period where a qualifying trader may exceed speculative limits or an existing exemption level pending the submission and approval of appropriate justification. An electronic trading facility should consider whether it wants to restrict exemptions during the last several days of trading in a delivery month. Acceptable procedures for obtaining and granting exemptions include a requirement that the electronic trading facility approve a specific maximum higher level.

(iii) An acceptable speculative limit program should have specific policies for taking regulatory action once a violation of a position limit or exemption is detected. The electronic trading facility policies should consider appropriate actions.

(8) *Violation of Commission rules.* A violation of position limits for significant price discovery contracts that have been self-certified by an electronic trading facility is also a violation of section 4a(e) of the Act.

CORE PRINCIPLE V—EMERGENCY AUTHORITY. The electronic trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to liquidate open positions in significant price discovery contracts and to suspend or curtail trading in a significant price discovery contract.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded should have clear procedures and guidelines for decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision-making. An electronic trading facility on which significant price discovery contracts are executed or traded should also have the authority to intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention. Procedures and guidelines should include notifying the Commission of

the exercise of the electronic trading facility's regulatory emergency authority, explaining how conflicts of interest are minimized, and documenting the electronic trading facility's decision-making process and the reasons for using its emergency action authority. Information on steps taken under such procedures should be included in a submission of a certified rule and any related submissions for rule approval pursuant to part 40 of this chapter, when carried out pursuant to an electronic trading facility's emergency authority. To address perceived market threats, the electronic trading facility on which significant price discovery contracts are executed or traded should, among other things, be able to impose position limits in the delivery month, impose or modify price limits, modify circuit breakers, call for additional margin either from market participants or clearing members (for contracts that are cleared through a clearinghouse), order the liquidation or transfer of open positions, order the fixing of a settlement price, order a reduction in positions, extend or shorten the expiration date or the trading hours, suspend or curtail trading on the electronic trading facility, order the transfer of contracts and the margin for such contracts from one market participant to another, or alter the delivery terms or conditions or, if applicable, should provide for such actions through its agreements with its third-party provider of clearing services.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE VI—DAILY PUBLICATION OF TRADING INFORMATION. The electronic trading facility shall make public daily information on price, trading volume, and other trading data to the extent appropriate for significant price discovery contracts.

(a) *Guidance.* An electronic trading facility, with respect to significant price discovery contracts, should provide to the public information regarding settlement prices, price range, volume, open interest, and other related market information for all applicable contracts as determined by the Commission on a fair, equitable and timely basis. Provision of information for any applicable contract can be through such means as provision of the information to a financial information service or by timely placement of the information on the electronic trading facility's public Web site.

(b) *Acceptable practices.* Compliance with § 16.01 of this chapter, which is mandatory, is an acceptable practice that satisfies the requirements of Core Principle VI.

CORE PRINCIPLE VII—COMPLIANCE WITH RULES. The electronic trading facility shall monitor and enforce compliance with the rules of the electronic trading facility, including the terms and conditions of any contracts to be traded and any limitations on access to the electronic trading facility.

(a) *Guidance*—(1) An electronic trading facility on which significant price discovery contracts are executed or traded should have appropriate arrangements and resources for effective trade practice surveillance programs, with the authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by its market participants. The arrangements and resources should facilitate the direct supervision of the market and the analysis of data collected. Trade practice surveillance programs may be carried out by the electronic trading facility itself or through delegation or contracting-out to a third party. If the electronic trading facility on which significant price discovery contracts are executed or traded delegates or contracts-out the trade practice surveillance responsibility to a third party, such third party should have the capacity and authority to carry out such programs, and the electronic trading facility should retain appropriate supervisory authority over the third party.

(2) An electronic trading facility on which significant price discovery contracts are executed or traded should have arrangements, resources and authority for effective rule enforcement. The Commission believes that this should include the authority and ability to discipline and limit or suspend the activities of a market participant as well as the authority and ability to terminate the activities of a market participant pursuant to clear and fair standards. The electronic trading facility can satisfy this criterion for market participants by expelling or denying such person's future access upon a determination that such a person has violated the electronic trading facility's rules.

(b) *Acceptable practices.* An acceptable trade practice surveillance program generally would include:

(1) Maintenance of data reflecting the details of each transaction executed on the electronic trading facility;

(2) Electronic analysis of this data routinely to detect potential trading violations;

(3) Appropriate and thorough investigative analysis of these and other potential trading violations brought to the electronic trading facility's attention; and

(4) Prompt and effective disciplinary action for any violation that is found to have been committed. The Commission believes that the latter element should include the authority and ability to discipline and limit or suspend the activities of a market participant pursuant to clear and fair standards that are available to market participants. *See, e.g.,* 17 CFR part 8.

CORE PRINCIPLE VIII—CONFLICTS OF INTEREST. The electronic trading facility on which significant price discovery contracts are executed or traded shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the electronic trading facility and establish a process for resolving such conflicts of interest.

(a) *Guidance.* (1) The means to address conflicts of interest in the decision-making of an electronic trading facility on which significant price discovery contracts are executed or traded should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the electronic trading facility on which significant price discovery contracts are executed or traded should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and electronic trading facility employees or gained through an ownership interest in the electronic trading facility or its parent organization(s).

(2) All electronic trading facilities on which significant price discovery contracts are traded bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided in section 3 of the Act. Under Core Principle VIII, they are also required to minimize conflicts of interest in their decision-making processes. To comply with this core principle, electronic trading facilities on which significant price discovery contracts are traded should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, market participants, other industry participants and other constituencies.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE IX—ANTITRUST CONSIDERATIONS. Unless necessary or appropriate to achieve the purposes of this Act, the electronic trading facility, with respect to any significant price discovery contracts, shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the electronic trading facility.

(a) *Guidance.* An electronic trading facility, with respect to a significant price discovery contract, may at any time request that the Commission consider under the provisions of section 15(b) of the Act any of the electronic trading facility's rules, which may be trading protocols or policies, operational rules, or terms or conditions of any significant price discovery contract. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable practices.* [Reserved]

PART 38—DESIGNATED CONTRACT MARKETS

■ 73. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203,124 Stat. 1376 (2010).

■ 74. Revise § 38.2 to read as follows:

§ 38.2 Exempt provisions.

A designated contract market, the designated contract market's operator and transactions traded on or through a designated contract market under section 5 of the Act shall comply with all applicable regulations under Title 17

of the Code of Federal Regulations, except for the requirements of § 1.39(b), § 1.44, § 1.53, § 1.54, § 1.59(b) and (c), § 1.62, § 1.63(a) and (b) and (d) through (f), § 1.64, § 1.69, part 8, § 100.1, § 155.2, and part 156.

PART 41—SECURITY FUTURES PRODUCTS

■ 75. The authority citation for part 41 continues to read as follows:

Authority: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763, 7 U.S.C. 1a, 2, 6f, 6j, 7a–2, 12a; 15 U.S.C. 78g(c)(2).

■ 76. Revise paragraph (e) of § 41.1 to read as follows:

§ 41.1 Definitions

* * * * *

(e) *Narrow-based security index* has the same meaning as in section 1a(35) of the Commodity Exchange Act.

* * * * *

■ 77. Revise § 41.2 to read as follows:

§ 41.2 Required records.

A designated contract market that trades a security index or security futures product shall maintain in accordance with the requirements of § 1.31 of this chapter books and records of all activities related to the trading of such products, including: Records related to any determination under subpart B of this part whether or not a futures contract on a security index is a narrow-based security index or a broad-based security index.

■ 78. Amend § 41.11 by revising paragraphs (a) introductory text, (b)(1) introductory text, (b)(2) introductory text, (c), and (d)(5) introductory text to read as follows:

§ 41.11 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) *Market capitalization.* For purposes of section 1a(35)(B) of the Act (7 U.S.C. 1a(35)(B)):

* * * * *

(b) * * *

(1) For purposes of section 1a(35)(A) and (B) of the Act (7 U.S.C. 1a(35)(A) and (B)):

* * * * *

(2) For purposes of section 1a(35)(B)(III)(cc) of the Act (7 U.S.C. 1a(35)(B)(III)(cc)):

* * * * *

(c) *Depositary Shares and Section 12 Registration.* For purposes of section 1a(35)(B)(III)(aa) of the Act (7 U.S.C. 1a(35)(B)(III)(aa)), the requirement that each component security of an index be registered pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) shall be satisfied with respect to any security that is a depositary share if the deposited securities underlying the depositary share are registered pursuant to section 12 of the Securities Exchange Act of 1934 and the depositary share is registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) on Form F–6 (17 CFR 239.36).

(d) * * *

(5) *Lowest weighted 25% of an index.* With respect to any particular day, the lowest weighted component securities comprising, in the aggregate, 25% of an index's weighting for purposes of section 1a(35)(A)(iv) of the Act (7 U.S.C. 1a(35)(A)(iv)) (''lowest weighted 25% of an index'') means those securities:

* * * * *

■ 79. Revise paragraph (a) introductory text of § 41.12 to read as follows:

§ 41.12 Indexes underlying futures contracts trading for fewer than 30 days.

(a) An index on which a contract of sale for future delivery is trading on a designated contract market or foreign board of trade is not a narrow-based security index under section 1a(35) of the Act (7 U.S.C. 1a(35)) for the first 30 days of trading, if:

* * * * *

■ 80. Revise § 41.13 to read as follows:

§ 41.13 Futures contracts on security indexes trading on or subject to the rules of a foreign board of trade.

When a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market.

■ 81. Revise paragraphs (a)(1), (a)(3), (b)(1), (b)(2), and (b)(4) of § 41.21 to read as follows:

§ 41.21 Requirements for underlying securities.

(a) * * *

(1) The underlying security is registered pursuant to section 12 of the Securities Exchange Act of 1934;

* * * * *

(3) The underlying security conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

(b) * * *

(1) The index is a narrow-based security index as defined in section 1a(35) of the Act;

(2) The securities in the index are registered pursuant to section 12 of the Securities Exchange Act of 1934;

* * * * *

(4) The index conforms with the listing standards for the security futures product that the designated contract market has filed with the SEC under section 19(b) of the Securities Exchange Act of 1934.

■ 82. Revise the introductory text and paragraph (e) of § 41.22 to read as follows:

§ 41.22 Required certifications.

It shall be unlawful for a designated contract market to list for trading or execution a security futures product unless the designated contract market has provided the Commission with a certification that the specific security futures product or products and the designated contract market meet, as applicable, the following criteria:

* * * * *

(e) If the board of trade is a designated contract market pursuant to section 5 of the Act, dual trading in these security futures products is restricted in accordance with § 41.27;

* * * * *

■ 83. Revise paragraph (a) introductory text, paragraph (a)(5), and paragraph (b) of § 41.23 to read as follows:

§ 41.23 Listing of security futures products for trading.

(a) *Initial listing of products for trading.* To list new security futures products for trading, a designated contract market shall submit to the Commission at its Washington, DC headquarters, either in electronic or hard-copy form, to be received by the Commission no later than the day prior to the initiation of trading, a filing that:

* * * * *

(5) If the board of trade is a designated contract market pursuant to section 5 of the Act, it includes a certification that the security futures product complies with the Act and rules thereunder; and

* * * * *

(b) *Voluntary submission of security futures products for Commission approval.* A designated contract market may request that the Commission approve any security futures product under the procedures of § 40.5 of this chapter, *provided however,* that the registered entity shall include the certification required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of security futures products.

■ 84. Amend § 41.24 by removing paragraph (b), redesignating paragraph

(c) as paragraph (b), and revising redesignated paragraph (b), to read as follows:

§ 41.24 Rule amendments to security futures products.

* * * * *

(b) *Voluntary submission of rules for Commission review and approval.* A designated contract market or a registered derivatives clearing organization clearing security futures products may request that the Commission approve any rule or proposed rule or rule amendment relating to a security futures product under the procedures of § 40.5 of this chapter, *provided however,* that the registered entity shall include the certifications required by § 41.22 with its submission under § 40.5 of this chapter. Notice designated contract markets may not request Commission approval of rules.

■ 85. Revise paragraphs (a)(1), (a)(2) introductory text, (a)(3) introductory text, (a)(3)(i)(A), (a)(3)(i)(B), (a)(3)(iv), and (d) of § 41.25 to read as follows:

§ 41.25 Additional conditions for trading for security futures products.

(a) *Common provisions*—(1) *Reporting of data.* The designated contract market shall comply with part 16 of this chapter requiring the daily reporting of market data.

(2) *Regulatory trading halts.* The rules of a designated contract market that lists or trades one or more security futures products must include the following provisions:

* * * * *

(3) *Speculative position limits.* The designated contract market shall have rules in place establishing position limits or position accountability procedures for the expiring futures contract month. The designated contract market shall:

(i) * * *

(A) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares, or exceeds 15 million shares and there are more than 40 million shares of the underlying security outstanding, the designated contract market may adopt a net position limit no greater than 22,500 (100-share) contracts applicable to positions held during the last five trading days of an expiring contract month; or

(B) For security futures products where the average daily trading volume in the underlying security exceeds 20 million shares and there are more than 40 million shares of the underlying security outstanding, the designated contract market may adopt a position accountability rule. Upon request by the designated contract market, traders who hold net positions greater than 22,500 (100-share) contracts, or such lower level specified by exchange rules, must provide information to the exchange and consent to halt increasing their positions when so ordered by the exchange.

* * * * *

(iv) For purposes of this section, average daily trading volume shall be calculated monthly, using data for the most recent six-month period. If the data justify a higher or lower speculative limit for a security future, the designated contract market may raise or lower the position limit for that security future effective no earlier than the day after it has provided notification to the Commission and to the public under the submission requirements of § 41.24. If the data require imposition of a reduced position limit for a security future, the designated contract market may permit any trader holding a position in compliance with the previous position limit, but in excess of the reduced limit, to maintain such position through the expiration of the security futures contract; *provided,* that the designated contract market does not find that the position poses a threat to the orderly expiration of such contract.

* * * * *

(d) The Commission may exempt a designated contract market from the provisions of paragraphs (a)(2) and (b) of this section, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is consistent with the public interest and the protection of customers. An exemption granted pursuant to this paragraph shall not operate as an exemption from any Securities and Exchange Commission rules. Any exemption that may be required from such rules must be obtained separately from the Securities and Exchange Commission.

■ 86. Amend § 41.27 by:

■ a. Revising paragraphs (a)(1), (a)(3) introductory text, (a)(4)(v), (a)(5), (b), (d) introductory text, (d)(1), (d)(4), and (f); and

■ b. Removing and reserving paragraphs (c)(2) and (e)(2), to read as follows:

§ 41.27 Prohibition of dual trading in security futures products by floor brokers.

(a) * * *

(1) Trading session means hours during which a designated contract market is scheduled to trade continuously during a trading day, as set forth in its rules, including any related post settlement trading session. A designated contract market may have more than one trading session during a trading day.

* * * * *

(3) Broker association includes two or more designated contract market members with floor trading privileges of whom at least one is acting as a floor broker who:

* * * * *

(4) * * *

(v) An account for another member present on the floor of a designated contract market or an account controlled by such other member.

(5) Dual trading means the execution of customer orders by a floor broker through open outcry during the same trading session in which the floor broker executes directly or by initiating and passing to another member, either through open outcry or through a trading system that electronically matches bids and offers pursuant to a predetermined algorithm, a transaction for the same security futures product on the same designated contract market for an account described in paragraphs (a)(4)(i) through (v) of this section.

(b) *Dual Trading Prohibition.* (1) No floor broker shall engage in dual trading in a security futures product on a designated contract market, except as otherwise provided under paragraphs (d), (e), and (f) of this section.

(2) A designated contract market operating an electronic market or electronic trading system that provides market participants with a time or place advantage or the ability to override a predetermined algorithm must submit an appropriate rule proposal to the Commission consistent with the procedures set forth in § 40.5. The proposed rule must prohibit electronic market participants with a time or place advantage or the ability to override a predetermined algorithm from trading a security futures product for accounts in which these same participants have any interest during the same trading session that they also trade the same security futures product for other accounts. This paragraph, however, is not applicable with respect to execution priorities or quantity guarantees granted to market makers who perform that function, or to market participants who receive execution priorities based on price improvement activity, in accordance with the rules governing the designated contract market.

(c) * * *

(2) [Reserved]

(d) *Specific Permitted Exceptions.* Notwithstanding the applicability of a dual trading prohibition under

paragraph (b) of this section, dual trading may be permitted on a designated contract market pursuant to one or more of the following specific exceptions:

(1) *Correction of errors.* To offset trading errors resulting from the execution of customer orders, *provided,* that the floor broker must liquidate the position in his or her personal error account resulting from that error through open outcry or through a trading system that electronically matches bids and offers as soon as practicable, but, except as provided herein, not later than the close of business on the business day following the discovery of error. In the event that a floor broker is unable to offset the error trade because the daily price fluctuation limit is reached, a trading halt is imposed by the designated contract market, or an emergency is declared pursuant to the rules of the designated contract market, the floor broker must liquidate the position in his or her personal error account resulting from that error as soon as practicable thereafter.

* * * * *

(4) *Market emergencies.* To address emergency market conditions resulting in a temporary emergency action as determined by a designated contract market.

(e) * * *

(2) [Reserved]

(f) *Unique or Special Characteristics of Agreements, Contracts or Transactions, or of Designated Contract Markets.* Notwithstanding the applicability of a dual trading prohibition under paragraph (b) of this section, dual trading may be permitted on a designated contract market to address unique or special characteristics of agreements, contracts, or transactions, or of the designated contract market as provided herein. Any rule of a designated contract market that would permit dual trading when it would otherwise be prohibited, based on a unique or special characteristic of agreements, contracts, or transactions, or of the designated contract market must be submitted to the Commission for prior approval under the procedures set forth in § 40.5. The rule submission must include a detailed demonstration of why an exception is warranted.

■ 87. Revise paragraphs (a)(4)(i)(B) and (a)(30) of § 41.43 to read as follows:

§ 41.43 Definitions.

(a) * * *

(4) * * *

(i) * * *

(B) If the instrument underlying such security future is a narrow-based security index, as defined in section 1a(35)(A) of the Act, the product of the daily settlement price of such security future as shown by any regularly published reporting or quotation service, and the applicable contract multiplier.

* * * * *

(30) *Self-regulatory authority* means a national securities exchange registered under section 6 of the Exchange Act, a national securities association registered under section 15A of the Exchange Act, or a contract market registered under section 5 of the Act or section 5f of the Act.

* * * * *

■ 88. Revise paragraph (b) introductory text of § 41.49 to read as follows:

§ 41.49 Filing proposed margin rule changes with the Commission.

* * * * *

(b) *Filing requirements under the Act.* Any self-regulatory authority that is registered with the Commission as a designated contract market under section 5 of the Act shall, when filing a proposed rule change regarding customer margin for security futures with the SEC for approval in accordance with section 19(b)(2) of the Exchange Act, submit such proposed rule change to the Commission as follows:

* * * * *

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 89. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2 and 12a.

■ 90. Amend § 140.72 by revising the section heading and paragraphs (a), (b), (d) and (f), to read as follows:

§ 140.72 Delegation of authority to disclose confidential information to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(a) Pursuant to the authority granted under sections 2(a)(11), 8a(5) and 8a(6) of the Act, the Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director, the Deputy Executive Director, the Special Assistant to the Executive Director, the Director of the Division of Clearing and Intermediary Oversight, each Deputy Director of the Division of Clearing and Intermediary Oversight, the Chief Accountant, the General Counsel, each Deputy General Counsel, the Director of the Division of Market Oversight, each Deputy Director of the Division of Market Oversight, the Deputy Director of the Market and Trade Practice Surveillance Branch, the Director of the Division of Enforcement, each Deputy Director of the Division of Enforcement, each Associate Director of the Division of Enforcement, the Chief Counsel of the Division of Enforcement, each Regional Counsel of the Division of Enforcement, each of the Regional Administrators, the Chief Economist of the Office of the Chief Economist, the Deputy Chief Economist of the Office of the Chief Economist, the Director of the Office of International Affairs, and the Deputy Director of the Office of International Affairs, the authority to disclose to an official of any contract market, swap execution facility, swap data repository, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, any information necessary or appropriate to effectuate the purposes of the Act, including, but not limited to, the full facts concerning any transaction or market operation, including the names of the parties thereto. This authority to disclose shall be based on a determination that the transaction or market operation disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors or that disclosure is necessary or appropriate to effectuate the purposes of the Act. The authority to make such a determination is also delegated by the Commission to the Commission employees identified in this section. A Commission employee delegated authority under this section may exercise that authority on his or her own initiative or in response to a request by an official of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization.

(b) Disclosure under this section shall only be made to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization official who is named in a list filed with the Commission by the chief executive officer of the contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization, which sets forth the official's name, business address and telephone number. The chief executive officer shall thereafter notify the Commission of any deletions or additions to the list of officials authorized to receive disclosures under this section. The original list and any supplemental list required by this paragraph shall be filed with the Secretary of the Commission, and a

copy thereof shall also be filed with the Regional Coordinator for the region in which the contract market, swap execution facility, or swap data repository is located or in which the registered futures association or self-regulatory organization has its principal office.

* * * * *

(d) For purposes of this section, the term ''official'' shall mean any officer or member of a committee of a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization who is specifically charged with market surveillance or audit or investigative responsibilities, or their duly authorized representative or agent, who is named on the list filed pursuant to paragraph (b) of this section or any supplement thereto.

* * * * *

(f) Any contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization receiving information from the Commission under these provisions shall not disclose such information except that disclosure may be made in any self-regulatory action or proceeding.

■ 91. Amend § 140.77 by revising the section heading and paragraph (a) to read as follows:

§ 140.77 Delegation of authority to determine that applications for contract market designation, swap execution facility registration, or swap data repository registration are materially incomplete.

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designees, the authority to determine that an application for contract market designation, swap execution facility registration, or swap data repository registration is materially incomplete under section 6 of the Commodity Exchange Act and to so notify the applicant.

* * * * *

■ 92. Revise paragraphs (a) and (b) of § 140.96 to read as follows:

§ 140.96 Delegation of authority to publish in the Federal Register.

(a) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designee, with the concurrence of the General Counsel or the General Counsel's designee, the authority to publish in the **Federal Register** notice of the availability for comment of the proposed terms and conditions of applications for contract market designation, swap execution facility and swap data repository registration, and to determine to publish, and to publish, requests for public comment on proposed exchange, swap execution facility, or swap data repository rules, and rule amendments, when there exists novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with the Act, including regulations under the Act.

(b) The Commodity Futures Trading Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Market Oversight or the Director's designee, and to the Director of the Division of Clearing and Intermediary Oversight or the Director's designee, with the concurrence of the General Counsel or the General Counsel's designee, the authority to determine to publish, and to publish, in the **Federal Register**, requests for public comment on proposed exchange and self-regulatory organization rule amendments when publication of the proposed rule amendment is in the public interest and will assist the Commission in considering the views of interested persons.

* * * * *

■ 93. Revise paragraph (d)(2) of § 140.99 to read as follows:

§ 140.99 Requests for exemptive, no-action and interpretative letters.

* * * * *

(d) * * *

(2) A request for a Letter relating to the provisions of the Act or the Commission's rules, regulations or orders governing designated contract markets, registered swap execution facilities, registered swap data repositories, exempt commercial markets, exempt boards of trade, the nature of particular transactions and whether they are exempt or excluded from being required to be traded on one of the foregoing entities, foreign trading terminals, hedging exemptions, and the reporting of market positions shall be filed with the Director, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. A request for a Letter relating to all other provisions of the Act or Commission rules shall be filed with the Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. The request must be submitted electronically using the email address *dmoletters@cftc.gov* (for requests filed with the Division of Market Oversight), or *dcioletters@cftc.gov* (for requests filed with the Division of Clearing and Intermediary Oversight), as appropriate, and a properly signed paper copy of the request must be provided to the Division of Market Oversight or the Division of Clearing and Intermediary Oversight, as appropriate, within ten days for purposes of verification of the electronic submission.

* * * * *

■ 94. Amend § 140.735–2 by:

■ a. Redesignating paragraphs (b)(1)(i), (b)(1)(ii), and (b)(1)(iii) as (b)(1)(ii), (b)(1)(iv), and (b)(1)(v), respectively;

■ b. Adding paragraphs (b)(1)(i) and (b)(1)(iii); and

■ c. Revising paragraphs (b)(2) and (c), to read as follows:

§ 140.735–2 Prohibited transactions.

* * * * *

(b) * * *

(1) * * *

(i) In swaps;

* * * * *

(iii) In retail forex transactions, as that term is defined in § 5.1(m) of this chapter;

* * * * *

(2) Effect any purchase or sale of a commodity option, futures contract, or swap involving a security or group of securities;

* * * * *

(c) *Exception for farming, ranching, and natural resource operations.* The prohibitions in paragraphs (b)(1)(i), (ii), and (iv) of this section shall not apply to a transaction in connection with any farming, ranching, oil and gas, mineral rights, or other natural resource operation in which the member or employee has a financial interest, if he or she is not involved in the decision to engage in, and does not have prior knowledge of, the actual futures, commodity option, or swap transaction and has previously notified the General Counsel [2] in writing of the nature of the operation, the extent of the member's or employee's interest, the types of transactions in which the operation may engage, and the identity of the person or

[2] As used in this subpart, ''General Counsel'' refers to the General Counsel in his or her capacity as counselor for the Commission and designated agency ethics official for the Commission, and includes his or her designee and the alternate designated agency ethics official appointed by the agency head pursuant to 5 CFR 2638.202.

persons who will make trading decisions for the operation; [3] or

* * * * *

■ 95. Revise paragraph (b)(1) of § 140.735–2a to read as follows:

§ 140.735–2a Prohibited interests.

* * * * *

(b) * * *

(1) Have a financial interest, through ownership of securities or otherwise, in any person [5] registered with the Commission (including futures commission merchants, associated persons and agents of futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators, and any other persons required to be registered in a fashion similar to any of the above under the Commodity Exchange Act or pursuant to any rule or regulation promulgated by the Commission), or any contract market, swap execution facility, swap data repository, board of trade, or other trading facility, or any derivatives clearing organization subject to regulation or oversight by the Commission; [6]

* * * * *

■ 96. Revise § 140.735–3 to read as follows:

§ 140.735–3 Non-governmental employment and other outside activity.

A Commission member or employee shall not accept employment or compensation from any person, exchange, swap execution facility, swap data repository or derivatives clearing organization subject to regulation by the Commission. For purposes of this section, a person subject to regulation by the Commission includes but is not limited to a contract market, swap execution facility, swap data repository or derivatives clearing organization or member thereof, a registered futures commission merchant, any person associated with a futures commission merchant or with any agent of a futures commission merchant, floor broker, commodity trading advisor, commodity pool operator or any person required to be registered in a fashion similar to any of the above or file reports under the Act or pursuant to any rule or regulation promulgated by the Commission.[11]

[3] Although not required, if they choose to do so, members or employees may use powers of attorney or other arrangements in order to meet the notice requirements of, and to assure that they have no control or knowledge of, futures, commodity option, or swap transactions permitted under paragraph (c) of this section. A member or employee considering such arrangements should consult with the Office of General Counsel in advance for approval. Should a member or employee gain knowledge of an actual futures, commodity option, or swap transaction entered into by an operation described in paragraph (c) of this section that has already taken place and the market position represented by that transaction remains open, he or she should promptly report that fact and all other details to the General Counsel and seek advice as to what action, including recusal from any particular matter that will have a direct and predictable effect on the financial interest in question, may be appropriate.

[5] As defined in section 1a(38) of the Commodity Exchange Act and 17 CFR 1.3(u) thereunder, a ''person'' includes an individual, association, partnership, corporation and a trust.

[6] Attention is directed to 18 U.S.C. 208.

[11] Attention is directed to section 2(a)(8) of the Commodity Exchange Act, which provides, among other things, that no Commission member or employee shall accept employment or compensation from any person, exchange or derivatives clearing organization (''clearinghouse'') subject to regulation by the Commission, or participate, directly or indirectly, in any contract market operations or transactions of a character subject to regulation by the Commission.

PART 145—COMMISSION RECORDS AND INFORMATION

■ 97. The authority citation for part 145 continues to read as follows:

Authority: Pub. L. 99–570, 100 Stat. 3207; Pub. L. 89–554, 80 Stat. 383; Pub. L. 90–23, 81 Stat. 54; Pub. L. 98–502, 88 Stat. 1561–1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93–463, 88 Stat. 1389 (5 U.S.C. 4a(j)); unless otherwise noted.

■ 98. Revise paragraphs (c)(1), (d)(1) introductory text, and (d)(1)(vi) of § 145.9 to read as follows:

§ 145.9 Petition for confidential treatment of information submitted to the Commission.

* * * * *

(c) * * *

(1) *Submitter.* A ''submitter'' is any person who submits any information or material to the Commission or who permits any information or material to be submitted to the Commission. For purposes of paragraph (d)(1)(ii) of this section only, ''submitter'' includes any person whose information has been submitted to a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association that in turn has submitted the information to the Commission.

* * * * *

(d) *Written request for confidential treatment.* (1) Any submitter may request in writing that the Commission afford confidential treatment under the Freedom of Information Act to any information that he or she submits to the Commission. Except as provided in paragraph (d)(4) of this section, no oral requests for confidential treatment will be accepted by the Commission. The submitter shall specify the grounds on which confidential treatment is being requested but need not provide a detailed written justification of the request unless required to do so under paragraph (e) of this section. Confidential treatment may be requested only on the grounds that disclosure:

* * * * *

(vi) Would reveal investigatory records compiled for law enforcement purposes when disclosure would interfere with enforcement proceedings or disclose investigative techniques and procedures, *provided,* that the claim may be made only by a designated contract market, derivatives clearing organization, swap execution facility, swap data repository or registered futures association with regard to its own investigatory records.

* * * * *

■ 99. Revise paragraphs (a)(6), (a)(8), and (b)(13) of Appendix A to part 145 to read as follows:

Appendix A to Part 145—Compilation of Commission Records Available to the Public

* * * * *

(a) * * *

(6) Rule enforcement and financial reviews (public version).

* * * * *

(8) Commission rules and regulations, **Federal Register** notices, interpretative letters.

* * * * *

(b) * * *

(13) Publicly available portions of applications to become a registered entity including the transmittal letter, first page of the application cover sheet, proposed rules, proposed bylaws, corporate documents, any overview or similar summary provided by the applicant, any documents pertaining to the applicant's legal status and governance structure, including governance fitness information, and any other part of the application not covered by a request for confidential treatment.

* * * * *

PART 155—TRADING STANDARDS

■ 100. The authority citation for part 155 continues to read as follows:

Authority: 7 U.S.C. 6b, 6c, 6g, 6j, and 12a, unless otherwise noted.

■ 101. Revise the introductory text of § 155.2 to read as follows:

§ 155.2 Trading standards for floor brokers.

Each contract market shall adopt rules which shall, at a minimum, with respect to each member of the contract market acting as a floor broker:

* * * * *

■ 102. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(1) of § 155.3 to read as follows:

§ 155.3 Trading standards for futures commission merchants.

(a) * * *

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the floor of the appropriate contract market before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

* * * * *

(b) * * *

(2) * * *

(ii) In the case of a customer who does not qualify as an ''institutional customer'' as defined in § 1.3(g) of this chapter, a futures commission merchant must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

(c) * * *

(1) Receives written authorization from a person designated by such other futures commission merchant or introducing broker with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section or § 155.4(a)(2), respectively;

* * * * *

■ 103. Revise paragraphs (a)(1), (b)(2)(ii), and (c)(2) of § 155.4 to read as follows:

§ 155.4 Trading standards for introducing brokers.

(a) * * *

(1) Insure, to the extent possible, that each order received from a customer which is executable at or near the market price is transmitted to the futures commission merchant carrying the account of the customer before any order in any future or in any commodity option in the same commodity for any proprietary account, any other account in which an affiliated person has an interest, or any account for which an affiliated person may originate orders without the prior specific consent of the account owner, if the affiliated person has gained knowledge of the customer's order prior to the transmission to the floor of the appropriate contract market of the order for a proprietary account, an account in which the affiliated person has an interest, or an account in which the affiliated person may originate orders without the prior specific consent of the account owner; and

* * * * *

(b) * * *

(2) * * *

(ii) In the case of a customer who does not qualify as an ''institutional customer'' as defined in § 1.3(g) of this chapter, an introducing broker must obtain the customer's prior consent through a signed acknowledgment, which may be accomplished in accordance with § 1.55(d) of this chapter.

* * * * *

(c) * * *

(2) Copies of all statements for such account and of all written records prepared by such futures commission merchant upon receipt of orders for such account pursuant to § 155.3(c)(2) are transmitted on a regular basis to the introducing broker with which such person is affiliated.

§ 155.6 [Removed and Reserved]

■ 104. Remove and reserve § 155.6.

PART 166—CUSTOMER PROTECTION RULES

■ 105. The authority citation for part 155 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b, 6c, 6d, 6g, 6h, 6k, 6l, 6*o,* 7, 12a, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 106. Revise paragraph (a) introductory text and paragraph (b) of § 166.2 to read as follows:

§ 166.2 Authorization to trade.

* * * * *

(a) With respect to a commodity interest as defined in any paragraph of the commodity interest definition in § 1.3(yy) of this chapter, specifically authorized the futures commission merchant, retail foreign exchange dealer, introducing broker or any of their associated persons to effect the transaction (a transaction is ''specifically authorized'' if the customer or person designated by the customer to control the account specifies—

* * * * *

(b) With respect to a commodity interest as defined in paragraph (1) or (2) of the commodity interest definition in § 1.3(yy) of this chapter, authorized in writing the futures commission merchant, introducing broker or any of their associated persons to effect transactions in commodity interests for the account without the customer's specific authorization; *Provided, however,* That if any such futures commission merchant, introducing broker or any of their associated persons is also authorized to effect transactions in foreign futures or foreign options without the customer's specific authorization, such authorization must be expressly documented.

■ 107. Revise paragraph (a)(2) of § 166.5 to read as follows:

§ 166.5 Dispute settlement procedures.

(a) * * *

(2) The term *customer* as used in this section includes any person for or on behalf of whom a member of a designated contract market, or a participant transacting on or through such designated contract market, effects a transaction on such contract market, except another member of or participant in such designated contract market. *Provided, however,* a person who is an ''eligible contract participant'' as defined in section 1a(18) of the Act shall not be deemed to be a customer within the meaning of this section.

* * * * *

Issued in Washington, DC on October 16, 2012, by the Commission.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

Appendices to Adaptation of Regulations To Incorporate Swaps—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule to amend and conform certain provisions of the Commodity Futures Trading Commission's (CFTC) regulations to incorporate swaps. These final conforming amendments are crucial to integrating the CFTC's regulations with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which expanded the scope of the Commodity Exchange Act to cover swaps.

Specifically, this final rule updates the CFTC's definitions of futures commission merchant (FCM) and introducing broker (IB) to fulfill the Dodd-Frank Act's requirement to permit these entities to trade swaps on behalf of their customers. This final rule also updates the definitions of commodity interest, customer, and customer funds to incorporate swaps. In addition, the final rule adds swap execution facilities (SEFs) to the list of CFTC-regulated trading venues.

The final rule amends existing recordkeeping requirements for FCMs and IBs to ensure that similar records are kept for swaps as are currently kept for futures. In addition, SEF members will be obligated to comply with the same recordkeeping duties as are required of designated contract market (DCM) members.

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FEDERAL REGISTER

Vol. 77 Friday,
No. 213 November 2, 2012

Part IV

The President

Executive Order 13629—Establishing the White House Homeland Security Partnership Council

Federal Register
Vol. 77, No. 213
Friday, November 2, 2012

Presidential Documents

Title 3—

The President

Executive Order 13629 of October 26, 2012

Establishing the White House Homeland Security Partnership Council

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to advance the Federal Government's use of local partnerships to address homeland security challenges, it is hereby ordered as follows:

Section 1. *Policy.* The purpose of this order is to maximize the Federal Government's ability to develop local partnerships in the United States to support homeland security priorities. Partnerships are collaborative working relationships in which the goals, structure, and roles and responsibilities of the relationships are mutually determined. Collaboration enables the Federal Government and its partners to use resources more efficiently, build on one another's expertise, drive innovation, engage in collective action, broaden investments to achieve shared goals, and improve performance. Partnerships enhance our ability to address homeland security priorities, from responding to natural disasters to preventing terrorism, by utilizing diverse perspectives, skills, tools, and resources.

The National Security Strategy emphasizes the importance of partnerships, underscoring that to keep our Nation safe ''we must tap the ingenuity outside government through strategic partnerships with the private sector, nongovernmental organizations, foundations, and community-based organizations. Such partnerships are critical to U.S. success at home and abroad, and we will support them through enhanced opportunities for engagement, coordination, transparency, and information sharing.'' This approach recognizes that, given the complexities and range of challenges, we must institutionalize an all-of-Nation effort to address the evolving threats to the United States.

Sec. 2. *White House Homeland Security Partnership Council and Steering Committee.*

(a) *White House Homeland Security Partnership Council.* There is established a White House Homeland Security Partnership Council (Council) to foster local partnerships—between the Federal Government and the private sector, nongovernmental organizations, foundations, community-based organizations, and State, local, tribal, and territorial government and law enforcement—to address homeland security challenges. The Council shall be chaired by the Assistant to the President for Homeland Security and Counterterrorism (Chair), or a designee from the National Security Staff.

(b) *Council Membership.*

(i) Pursuant to the nomination process established in subsection (b)(ii) of this section, the Council shall be composed of Federal officials who are from field offices of the executive departments, agencies, and bureaus (agencies) that are members of the Steering Committee established in subsection (c) of this section, and who have demonstrated an ability to develop, sustain, and institutionalize local partnerships to address policy priorities.

(ii) The nomination process and selection criteria for members of the Council shall be established by the Steering Committee. Based on those criteria, agency heads may select and present to the Steering Committee their nominee or nominees to represent them on the Council. The Steering

Committee shall consider all of the nominees and decide by consensus which of the nominees shall participate on the Council. Each member agency on the Steering Committee, with the exception of the Office of the Director of National Intelligence, may have at least one representative on the Council.

(c) *Steering Committee.* There is also established a Steering Committee, chaired by the Chair of the Council, to provide guidance to the Council and perform other functions as set forth in this order. The Steering Committee shall include a representative at the Deputy agency head level, or that representative's designee, from the following agencies:

(i) Department of State;

(ii) Department of the Treasury;

(iii) Department of Defense;

(iv) Department of Justice;

(v) Department of the Interior;

(vi) Department of Agriculture;

(vii) Department of Commerce;

(viii) Department of Labor;

(ix) Department of Health and Human Services;

(x) Department of Housing and Urban Development;

(xi) Department of Transportation;

(xii) Department of Energy;

(xiii) Department of Education;

(xiv) Department of Veterans Affairs;

(xv) Department of Homeland Security;

(xvi) Office of the Director of National Intelligence;

(xvii) Environmental Protection Agency;

(xviii) Small Business Administration; and

(xix) Federal Bureau of Investigation.

At the invitation of the Chair, representatives of agencies not listed in subsection (c) of this section or other executive branch entities may attend and participate in Steering Committee meetings as appropriate.

(d) *Administration.* The Chair or a designee shall convene meetings of the Council and Steering Committee, determine their agendas, and coordinate their work. The Council may establish subgroups consisting exclusively of Council members or their designees, as appropriate.

Sec. 3. *Mission and Function of the Council and Steering Committee.* (a) The Council shall, consistent with guidance from the Steering Committee:

(i) advise the Chair and Steering Committee members on priorities, challenges, and opportunities for local partnerships to support homeland security priorities, as well as regularly report to the Steering Committee on the Council's efforts;

(ii) promote homeland security priorities and opportunities for collaboration between Federal Government field offices and State, local, tribal, and territorial stakeholders;

(iii) advise and confer with State, local, tribal, and territorial stakeholders and agencies interested in expanding or building local homeland security partnerships;

(iv) raise awareness of local partnership best practices that can support homeland security priorities;

(v) as appropriate, conduct outreach to representatives of the private sector, nongovernmental organizations, foundations, community-based organizations, and State, local, tribal, and territorial government and law enforcement entities with relevant expertise for local homeland security partnerships, and collaborate with other Federal Government bodies; and

(vi) convene an annual meeting to exchange key findings, progress, and best practices.

(b) The Steering Committee shall:

(i) determine the scope of issue areas the Council will address and its operating protocols, in consultation with the Office of Management and Budget;

(ii) establish the nomination process and selection criteria for members of the Council as set forth in section 2(b)(ii) of this order;

(iii) provide guidance to the Council on the activities set forth in subsection (a) of this section; and

(iv) within 1 year of the selection of the Council members, and annually thereafter, provide a report on the work of the Council to the President through the Chair.

Sec. 4. *General Provisions.* (a) The heads of agencies participating in the Steering Committee shall assist and provide information to the Council, consistent with applicable law, as may be necessary to implement this order. Each agency shall bear its own expense for participating in the Council.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof;

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals; or

(iii) the functions of the Overseas Security Advisory Council.

(c) This order shall be implemented consistent with applicable law and appropriate protections for privacy and civil liberties, and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Washington, October 26, 2012.

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FEDERAL REGISTER

Vol. 77 Friday,
No. 213 November 2, 2012

Part V

The President

Notice of November 1, 2012—Continuation of the National Emergency With Respect to Sudan

Federal Register
Vol. 77, No. 213
Friday, November 2, 2012

Presidential Documents

Title 3—

The President

Notice of November 1, 2012

Continuation of the National Emergency With Respect to Sudan

On November 3, 1997, by Executive Order 13067, the President declared a national emergency with respect to Sudan and, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), took related steps to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the actions and policies of the Government of Sudan. On April 26, 2006, in Executive Order 13400, the President determined that the conflict in Sudan's Darfur region posed an unusual and extraordinary threat to the national security and foreign policy of the United States, expanded the scope of the national emergency to deal with that threat, and ordered the blocking of property of certain persons connected to the conflict. On October 13, 2006, the President issued Executive Order 13412 to take additional steps with respect to the national emergency and to implement the Darfur Peace and Accountability Act of 2006 (Public Law 109–344).

Because the actions and policies of the Government of Sudan continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on November 3, 1997, as expanded on April 26, 2006, and with respect to which additional steps were taken on October 13, 2006, must continue in effect beyond November 3, 2012. Therefore, consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to Sudan.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
Washington, November 1, 2012.

[FR Doc. 2012–27035
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S. 3624/P.L. 112–196

Military Commercial Driver's License Act of 2012 (Oct. 19, 2012; 126 Stat. 1459)

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